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IN THE

Supreme Court of the United States

DAVID G. HOUSLER, JR.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the State of Tennessee introduce as evidence a Defendant's statement knowing that material components of the statement are false without redacting or correcting the false portions?

2. Whether due process guarantees are violated when the State of Tennessee prosecutes two individuals for the same crime at separate trials using inconsistent theories that are mutually exclusive?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits, The Supreme Court of Tennessee, appears as *State v. Housler*, Case No. M2002-00419-SC-R11-CD (May 19, 2006), is unpublished, and is attached to this petition as Appendix A.

The opinion of Court of Criminal Appeals of Tennessee appears as *State v. Housler*, No. M2003 -00419-CCA-R3-CD (Tenn. Crim 02/27/2004), is unpublished, and is attached to this petition as Appendix O.

Certain findings of fact and conclusions by the trial judge are included in the Appendix. These findings were made in this case at the trial level and in the related case of *State v.*

Mathews, Montgomery County, Tennessee Circuit Court, Case No. 33791. These findings are attached to this petition as Appendices B, L, and M.

STATEMENT OF JURISDICTION

The Supreme Court of Tennessee issued an opinion denying relief on May 19, 2006. No petition for rehearing was filed. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

Fourteenth Amendment Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection - Section. 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Unless otherwise noted, the statutes and rules cited in this brief are the versions that were in effect at the time of Petitioner's offense.

STATEMENT OF THE CASE

Introduction

This case involves two prosecutions for one crime. In January, 1994 four employees were killed after closing at the Taco Bell restaurant in Clarksville, Tennessee. In 1996 a jury convicted Courtney Mathews for the murders of the four

employees. In 1997 a different jury found David Housler guilty of the four murders. Circuit Judge John Gasaway presided over both trials. This Petition raises two due process issues, inextricably related.

First, Petitioner contends his due process guarantees were violated when the State of Tennessee used false evidence before the grand jury and the trial jury. The false evidence was Petitioner's statement which was known to be materially false. There is no issue of fact as to whether the statement was materially false or whether the falsity was known. Pretrial prosecutors and state investigators admitted that material components of the Housler statement were false.[1] The trial court recognized before trial that material components of the statement were false.[2] The Supreme Court of Tennessee found that Housler's confession contained "many known factual falsehoods."[3] Yet the confession was admitted, unredacted and uncorrected, and was the primary piece of evidence against Housler. Second, Petitioner contends that his due process guarantees were violated by irreconcilably inconsistent prosecutions that were mutually exclusive. There is no issue of fact as to whether the prosecutions were inconsistent. After the Housler trial the trial judge specifically found that the prosecutions were mutually exclusive.[4] This finding is logically consistent with the admitted falsity of the statement. Because the Housler statement was materially false it naturally contradicted the truthful competent evidence admitted against Mathews, and thus, resulted in irreconcilable prosecutions which the trial judge specifically found to be mutually exclusive.

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[1] Pet. App. D 44a-67a; Pet. App. E 76a; Pet App. F 91a-93a,102a-108a,114a,118a,123a125a.

[2] Pet. App. P.

[3] Pet. App. A 12a,19a.

[4] Pet. App. L185a-191a; Pet App. M 204a-208a.

The Crime

Early Sunday, January 30, 1994, Courtney Mathews robbed the Taco Bell restaurant in Clarksville, Tennessee after closing and killed four co-workers with a 9 mm gun. A safe in the business office of the restaurant had been blown open by a shotgun blast and $2967.68 was missing. Pet. App. A 2a.

The crime garnered local outrage and national media attention, and within days Mathews, a newly-hired part-time employee of the restaurant, was arrested and charged with the murders and robbery. Mathews was a soldier stationed at nearby Fort Campbell, Kentucky. Pet. App. A 2a.

Work records showed that on Saturday, January 29, 1994, Mathews clocked in to work at Taco Bell at 2:10 p.m., clocked out for a break at 7:39 p.m., clocked back in at 8:12 p.m., and ended his shift at 9:11 p.m. Pet. App. A 2a.

Mathews resided on Ryder Avenue in Clarksville, four to five miles from the Taco Bell. According to Carl Ward, Mathews' roommate at the time, Mathews arrived home from work at 9:30 p.m. on the night of the murders and went into his room where he placed a shotgun, a 9 mm handgun, either a .22 or.25 caliber handgun, and shells and ammunition in a book bag. Mathews also grabbed a bowling-ball bag, black gloves, white latex gloves, spent some time talking to his father in New York, and then left the apartment alone. Ward testified that when Mathews left the house, he was wearing two layers of clothes, and a black three-quarter length coat. Before he left, Mathews told Ward, who had been examining the guns, to wipe his prints from them. Pet. App. A 2a; Pet. App. C 35a-43a.

A Taco Bell employee, Jelaine Walker, saw Mathews inside the restaurant later[5]. Walker observed Mathews crouch-

[5] Walker left soon thereafter, and did not stay to close the restaurant, probably saving her life.

ing behind a trash can in the dining area. Mathews said to Walker, "I am gone, you don't see me." Company policy prohibited entry of anyone into the restaurant once the dining area was closed at midnight. The drive-through lane generally remained open until 1:00 or 1:30 a.m. Pet. App. A 2a-3a.

Investigation of the crime scene revealed a disrupted ceiling tile in the men's bathroom that appeared to have been moved to create an opening after someone had been hiding above. A forensic specialist from the Tennessee Bureau of Investigation (TBI) later confirmed that Mathews' fingerprints were on a fan vent near the displaced tile. Pet. App. A 3a.

Witness Frankie Sanford placed an order from the drive-through lane of Taco Bell at 1:30 a.m. Inside the restaurant he saw, alive and well, each of the four victims working as normal; he also saw Mathews, in uniform, working. Pet. App. A 3a.

When John Ballard, a shift manager at the Taco Bell, stopped by the drive-through window at approximately 1:45 a.m. the employees were engaged in normal closing activities. Klopp, the evening manager at Taco Bell on the night of the killings, told Ballard that they had been very busy and hence were unable to close the drive-through window until 1:30 a.m. Ballard left the restaurant around 2:00 a.m. Pet. App. A 3a.

Witness Allen Ceruti, who at the time was employed by the Tennessee Department of Correction, drove by the Taco Bell at 4:30 a.m. He testified that he saw an African-American male partially open the metal rear door of the Taco Bell restaurant from the inside. Mathews is African-American. Housler is Caucasian. Pet. App. A 3a.

Investigators searched the interstate for evidence. Underneath the Red River Bridge on I-24, they collected several items of clothing, pieces of a latex glove, and other sundry items. One of the clothing items recovered was a three-quarter length black jacket. Forensic investigators determined

that a stain on the jacket was the blood of victim Kevin Campbell. Also, plastic fragments lodged in the coat were determined to be of the same type plastic as the plastic dial blown off the safe. Pet. App. A 5a.

Ward, Mathews roommate, identified the jacket from under the bridge as the one that Mathews was wearing on the night of the murders; and also testified that he had not seen the coat since that time and that Mathews, when he left their apartment on the night of the murders, said that no one would see the clothes he was wearing again. Ward further stated that on the Tuesday after the murders, Mathews attempted suicide in their apartment. On that evening, Mathews told Ward, while crying, "I don't deserve to live. I killed four people." Pet. App. A 5a.

Between the Sunday of the murders and his attempted suicide, Mathews told Shawntea Hooks, Ward's girlfriend, how he believed the perpetrator committed the crime:

> Well, he told me that whoever did it, they went into the Taco Bell before it closed, they went into the men's bathroom and climbed into the ceiling, waited until the store closed. They came down . . . and he said they killed two people in the front of the store and two in the back.

Pet. App. A 5a.

Shawn Peghee worked with Mathews at Fort Campbell in the mailroom. On the Friday before the murders, Mathews asked Peghee questions about the safe in the mailroom and whether one would be able to open the safe by shooting it. According to Pehgee, as Mathews left the mailroom, "he sort of looked back at me with a smile on his face, sort of a smirk, and he said something big was going to happen that weekend." Pet. App. A 5a-6a.

Fitz Dickson, who had known Mathews for eleven years, testified that he purchased a 9 millimeter gun for Mathews in late 1993. Dickson also testified that he saw Mathews buy

ammunition for the gun on the same day that he purchased it from him. Pet. App. A 6a.

During a search of Mathews' residence, investigators recovered several bullet fragments that Mathews had fired into the floor of this bedroom during an argument before the murders. A TBI forensic scientist testified that a cartridge case and numerous bullet fragments recovered from Mathews' apartment came from the same 9 millimeter weapon as the cartridges and bullets recovered from the crime scene and the victims' bodies. Pet. App. A 6a.

A plastic bag containing a disassembled Winchester shotgun was later found hidden behind Mathews' residence. Shawn Depto, Mathew's friend, informed investigators that he loaned Mathews the shotgun and shells before the murders. Forensic examiners determined that the lead slug used to shoot open the Taco Bell safe was fired from this shotgun. Shells, provided by Depto, matched the slug and shells collected from Taco Bell. Pet. App. A 6a.[6]

How Housler Got Involved

On January 23, 1994 (a week before the Taco Bell murders), Petitioner David Housler committed a street robbery in Clarksville near Grandpa's restaurant. On March 7, 1994, TBI Agent Jeff Puckett and Detective George Elliott of the Clarksville Police Department interviewed Housler at Fort Campbell, Kentucky. Housler was a 19 year old soldier stationed at Fort Campbell; and at the time, he had been detained by military authorities for being absent without leave. Detective Elliott suspected Housler of the Grandpa's

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[6] Sanford, Ceruti, Peghee, Dickson, Depto, Shawntea Ward, (Hooks), and several other witnesses (Antaya, Maurizzio, and Tansil) were called by the State in the Mathews trial. The State did not call them in the Housler trial. See discussion below @ pp. 21-22; see also Pet. App. N (witness lists).

robbery, and the investigators also asked about Taco Bell. During the course of the interview, Housler denied involvement in the Taco Bell murders and stated that on that night he attended a party at Kevin Tween's mobile-home in Oak Grove, Kentucky. His best recollection was that he stayed there all night with his girlfriend, Sulyn Ulangca. He also stated that on January 21, a week and a day before the murders, he and Sulyn may have attended a party at the same trailer; and that he did not know Mathews. Housler was arrested for the Grandpa's robbery on March 9, 1994. Pet. App. A 7a.

In the Montgomery County Jail, David Housler heard much talk about the Taco Bell murder/robberies and believed he could help himself by providing information to assist the Mathews prosecution. When Housler first met with his appointed counsel, they discussed providing information regarding Taco Bell in exchange for some consideration. Housler began to provide statements incriminating Mathews in the Taco Bell crimes, even though he had never met Mathews. None of these statements were true. However, Housler's purpose was not to tell the truth, or even to help convict Mathews; but simply to get out of jail. Pet. App. A 7a.

Housler first concocted a simple story about Mathews. Housler told his lawyer that he met Courtney Mathews at the Kentucky trailer party on Friday, January 21, 1994; and they had discussed the idea of robbing the place where Mathews worked. Housler's counsel communicated this information to District Attorney Carney, his former law partner, and negotiated bond reduction in exchange for a statement. Housler gave a statement on March 21, 1994, outlining the following:

> He met Mathews during a party at the Kentucky trailer on January 21, 1994.[7] Mathews said in the presence of

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[7] Housler's first statement implicating Mathews states "on Friday, January 21, 1994" he met Mathews. Later, versions changed to "a Friday

> several people, including Housler, that he had a place to rob—his place of work—and that when he did it, he would not leave any witnesses. He also stated that once he committed the robbery, they could read about it in the newspapers. Housler said that's all he knew.

Pet. App. A 7a-8a

Housler was released on bond, and he returned to his home in Kentucky for more than a year. In October 1995, the District Attorney's office informed that Housler would be interviewed, and ordered him to Clarksville. The District Attorney, his staff, and several involved police agencies were actively preparing for the Mathews trial. On or about October 11, 1995, Housler returned to Clarksville, and met with his lawyer, McMillan.[8] Again Housler said that he heard Mathews talking about robbing the Taco Bell and leaving no witness, and "that's all I know." McMillan and Housler met with Assistant DA Garrett, Assistant DA Bush, TBI Agent Puckett, Detective Charvis, and others. Housler was told that others had made statements about him.[9] Prosecutors used these statements to suggest Housler's involvement, showed Housler pictures of the dead victims, and talked about the

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night . . . approximately a week prior to the murders at Taco Bell." (10/20/95 statement.) Both versions are impossible, and not true. Taco Bell time records show that Mathews was at work in Clarksville on both nights, not in Kentucky. Mathews began employment at Taco Bell on January 20, and worked at Taco Bell every weekend night from his employment until the murders. Pet. App. A 12a.; See also Pet. App. J 141a-145a.

[8] The Opinion of the Supreme Court of Tennessee states this meeting occurred in 1994. The Opinion is not correct. The meeting occurred in October 1995. Pet. App. E 71a; Pet. App. F 88a-89a.

[9] The other statements were Michael Miller and Charlie Brown, both inmates trying to also benefit from Taco Bell. Both gave statements implicating Housler. Both later recanted and acknowledged their statements were totally false. Miller and Housler had gotten into a fight in jail, and Miller was exacting some revenge.

death penalty. Several other confrontational meetings occurred. Pet. App. D 61a-67a; Pet. App. E 72a.

The District Attorney and McMillan then negotiated a deal. If Housler was not the actual shooter, the District Attorney agreed to reduced charges and a sentence of 15 years in exchange for "complete cooperation." The deal required Housler to provide a complete proffer or statement detailing the Taco Bell crime. On October 20, 1995, Housler provided his proffer wherein he implicated himself, Sulyn Ulangca, Melanie Darwish, Kevin Tween, and Courtney Mathews. Housler gave great detail about the planning and execution of the crime. None of which was true. Housler placed himself, Sulyn Ulangca, Melanie Darwish, Kevin Tween, and Mathews at Taco Bell, and indicated that Mathews and Tween were the shooters. Pet. App. D 61a-67a; Pet. App. E 72a; Pet. App. I. After doing so, Housler was again released, free again, but not for long.

The Deal Goes Bad

The problem with Housler's proffer or final statement is that it is not true. Less than three weeks later, the District Attorney and the investigating officers had determined that Housler's statement was not true. Kevin Tween, who Housler had described as a shooter, had an alibi. Melanie Darwish had an alibi. Sulyn Ulangca had passed a lie detector test. Nothing else had been corroborated, and the State believed Housler had implicated three innocent people and provided a false statement. McMillan was ordered to bring Housler back to Clarksville. Pet. App. A 11a; Pet. App. E 76a, ADA Bush ["To the best of my recollection, that agreement was based upon Mr. Housler telling the truth and not implicating any innocent individuals. And as I said before, Mr. Housler changed his story so many times that we—I came to a point where I didn't know whether what the truth was? He just—at one point said he was there. Then he came back and said he wasn't there, he had made it all up."] Pet. App. J 141 a-145a.

On November 7, 1995, Housler and McMillan met again with the same prosecuting attorneys and investigating officers. Housler was confronted by an angry prosecution team, and told that Sulyn Ulangca had discredited his statement, and the police believed Ulangca, who was brought to Clarksville to confront him. Housler was arrested. That day, the District Attorney took the false statement, Detective Charvis, and Agent Puckett to the Grand Jury and secured an indictment. The State of Tennessee knew that the Housler statement was bogus, and in fact, Housler was indicted because his statement was false. Pet. App. F 90a-93a.; Pet. App. G 94a-98a, 118a DA Carney ["I indicted him because he had breached that agreement."]

Q. Were those statements [Housler's statements] before the Grand Jury? Did Agent Puckett take the statements to the Grand Jury?
A. [D.A. John Carney] Yes.
Q. The Grand Jury was shown the statements that you had determined by 1:00 were false, is that correct?
A. There were certain things in the statements that were false.
Q. Did you or anybody else in your presence before the Grand Jury describe those differences to the Grand Jury?
A. I didn't.[10]

Pet. App. F 91a.

On the same day that Housler was indicted based solely on the statement, the District Attorney brought Melanie Darwish

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[10] By the time General Carney presented Housler's statement to the Grand Jury he knew that several material aspects of the statement were false, including the involvement of Sulyn Ulangca and Kevin Tween, and the purchase by Housler of a 9 mm. General Carney's agents had already interviewed the alleged seller of the 9 mm and Ulangca and knew that the Housler statement was materially false. General Carney also knew that Housler had again denied being at Taco Bell. Pet. App. F 90a-93a.; Pet. App. G 94a-98a, 118a; Pet. App. H 123a-125a.

and Kevin Tween to the D.A.'s office, interviewed them, and heard their denial of any involvement at Taco Bell. Darwish and Tween were released after questioning, and neither Ulangca, Darwish nor Tween were ever indicted and/or otherwise charged. David Housler has been in jail ever since. Pet. App. D 60a-61a; Pet. App. E 76a; Pet. App. G 95a.

Trial Court

In pretrial proceedings, after the Mathews' conviction, the Housler defense[11] sought to exclude the Housler false state ment and evidentiary hearings were held in the trial court. The defense took the position that because the Housler statement was false it could not be used by the State of Tennessee for any purpose, either to obtain an indictment or to obtain a conviction. Pretrial, the Housler defense called DA Carney, ADA Garrett, the grand jury foreman, and the State's only grand jury witnesses (Puckett and Charvis) who had also testified in the *Mathews* trial.[12] During their respective testimonies, both DA Carney and TBI Agent Puckett, who took Housler's statement, admitted that significant portions of Housler's statement were false.[13] The trial court also recognized this predicament pretrial. ["It is unusual in the sense that based on what the lawyers tell me, the State readily admits that a portion of the defendant's statement is untrue, and may well be untrue in large measure."] Pet. App. P. Despite this finding, the trial court allowed the false statement to be admitted at trial, without correction or redaction.

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[11] The undersigned lawyers were appointed to represent Housler after the murder indictment.

[12] By this time Mathews had been tried and convicted. The transcript of his trial was available and the testimony presented by the State against Mathews could be compared to the Housler statement to prove its falsity. Since DA Carney and ADA Garrett were witnesses to the falsity issue, new prosecutors were appointed to try Housler.

[13] Pet. App.D 44a-67a; Pet. App. F 78a-93a.

In November 1997, the State introduced and used Housler's false statement against him. In fact, Housler's false statement became the only evidence against him, except for persistent efforts by the State to corroborate falsehood with incompetent and false evidence.[14] Housler was convicted of the four murders and sentenced to life on each count. Pet. App. A, 11a-12a.

Throughout the trial the State, relying upon the false statement and perjured testimony, introduced evidence completely inconsistent with their position in the Mathews' prosecution (a sole perpetrator theory) and insisted upon their right to do so. [DA Radford—"Well, first of all, let me address Mr. Terry? I am not bound by any theory that any other attorney had and Mr. Terry has kept saying that's the State's theory. Your honor, I am not bound by that theory. I am entitled to my own theories, in my own prosecution and to think otherwise is ridiculous.] Nothing could be more incorrect. In fact, the State of Tennessee is bound to a truthful theory and obligated to present only truthful facts.

Mathews was called as a witness at the Housler trial. Mathews refused to testify. A motion for new trial was filed and extensive post trial proceedings were conducted, concluding in July of 2000. Post trial, Judge Gasaway made numerous findings, including:

> The Court recognizes that the prosecution of Courtney Mathews and the prosecution David Housler by the State was on different theories

Pet. App. L 185a

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[14] The best example is Larry Underhill, a career criminal who testified that Housler confessed to him in jail that he killed the victims execution style, a rendition that contradicted all crime scene evidence. Underhill had a history of drug and alcohol abuse, and mental health problems. Post-trial Underhill recanted and said he never met Housler, and the information had come from a hallucination. Pet. App. A 28a-29a.

> But Mr. Radford (State prosecutor), the only conclusion that anyone could draw from the prosecution of Mr. Mathews was that the State's theory in the Mathews' trial was more than he was the lone shooter, it was that he was the lone actor.

Pet. App. L 190a

Supreme Court of Tennessee

The Supreme Court of Tennessee granted petitioner's application for appeal and heard this case with both the Mathews' record and the Housler record before it.[15] The court recognized the Housler statement had many known factual falsehoods and that *Mooney*[16] and *Napue*[17] prohibited the use of false evidence.[18] Rather than order relief based on *Mooney*, the court created an exception because the false evidence was the defendant's statement. The Supreme Court of Tennessee concluded that *Mooney* and *Napue* were not applicable, that the State could introduce the many known factual falsehoods if one component of the statement was minimally corroborated.[19]

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[15] The Court of Criminal Appeals first heard the appeal but refused to consider the Mathews' record, so a comparison of the prosecutions was impossible. The Supreme Court granted review and heard the case with both records. Pet. App. O.

[16] *Mooney v. Holohan*, 294 US 103 (1935).

[17] *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959).

[18] The Supreme Court of Tennessee specifically acknowledges some of the known false facts in its opinion. Pet. App. A 12a.

[19] Pet. App. A 19a, 21a.

REASONS FOR GRANTING THE WRIT

The Decision of the Supreme Court of Tennessee Directly Conflicts with Decisions by this Court and the Courts of Appeal on an Important Federal Question.

The Decision of the Supreme Court of Tennessee Has Created a *Mooney* Exception Which Allows the Knowing Use of False Evidence.

Evidence known to be false by the prosecution was admitted in the trial of David Housler. The falsity was not corrected or redacted. These facts are true and undisputed. Prosecutors and police agents admitted before trial that material components of the final Housler statement were false.[20] The Housler statement was originally a proffer as part of his agreement to plead guilty and testify against Mathews. When the State determined the proffer or statement was materially false, the State revoked the plea agreement, and then used the false statement against Housler. The trial recognized found that material components of the statement were false.[21] The Supreme Court of Tennessee specifically found that the Housler statement contained "many known factual falsehoods."[22] Yet, unredacted and uncorrected, the statement was admitted as evidence before the jury even though both parties and the trial judge knew that material components of the statement were false. Rather than stipulate, correct, or redact known falsity, the buck was passed to the jury to filter out the truth, even though all participants knew the truth. This process corrupted the truth seeking function of the trial and deeply offends the purpose for and decisions in support of the Fourteenth Amendment Due Process Clause.

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[20] Pet. App. D 44a-67a; Pet. App. E 76a; Pet App. F 91a-93a,102a-108a,114a,118a,123a125a.

[21] Pet. App. P.

[22] Pet. App. A 12a,19a.

This Court need answer only one question . . . . May the State of Tennessee admit as evidence in a criminal proceeding a defendant's statement knowing that material components of the statement are false without redacting or correcting the false portions? This record is ideal for resolving this issue because the known factual falsehoods are admitted by both parties and the Supreme Court of Tennessee. There is no issue about whether the State of Tennessee knowingly admitted false facts. The only issue is whether or not this knowing use of false evidence violates due process guarantees.

In 1935, this Court in *Mooney v. Holohan*, 294 US 103 (1935) issued a powerful opinion from which there has been no retreat. In *Mooney*, this Court established the clear constitutional principle that the Due Process Clause of the Fourteenth Amendment prohibits the knowing use by the government of evidence which is false. *Mooney* involved the knowing use of perjured testimony and the suppression of exculpatory impeachment evidence. *id.* at 110,111. *See Pyle v. Kansas*, 317 U. S. 213 (1942).

In *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103 (1957) the prosecutor had advised a witness not to volunteer specific information favorable to the defendant. The witness testified falsely to the fact and the prosecutor did not correct. *id.* at 30, 31. This Court cited *Mooney* and *Pyle* and found that due process of law was not accorded when a prosecutor elicited known false testimony and did not correct it. *Alcorta* established an unqualified duty to correct known falsity which has now been erroneously qualified by the Supreme Court of Tennessee.

The *Mooney* principle was restated in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959). In *Napue*, the State had allowed a witness to testify falsely about consideration received for cooperation. This Court found that the false testimony which only affected credibility, and was not substan-

tive, still violated the Due Process Clause, and required reversal. ["The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to credibility to the witness." *id.* at 269.] See *Giglio v. United States*, 408 U.S. 150, 92 S.Ct. 763 (1972) [One prosecutor promised immunity for testimony. Another prosecutor tried the case not knowing of the promise. The witness denied the deal. Reversal required under *Mooney*.]

Mooney and its progeny unequivocally hold that the State cannot knowingly use false evidence or allow false testimony to go uncorrected. This standard does not change when the uncorrected false evidence is the defendant's statement.[23] Writing for the Court in *Napue*, Chief Justice Warren stated the proposition simply and clearly: "A lie is a lie, no matter what its subject, and, if in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . ." *Napue*, at, 269, 270.

The scenario in this case is unusual. Usually, when the State uses a defendant's statement over his objection, the State **believes** the information therein to be correct. It is rare, and perhaps only in multiple litigations, where the record demonstrates clearly that the State has used a statement which the State knows is false. Petitioner contends strongly that no party, in any type of litigation, criminal or civil, can use any form of evidence knowing that the information therein is false. To do so is a constitutional violation resulting in the

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[23] "There is nothing in *Napue*, its predecessors, or its progeny, to suggest that the Constitution protects defendants only against the knowing use of perjured testimony. Due process protects defendants against the knowing use of any false evidence by the State, whether it be by document, testimony, or any other form of admissible evidence." *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005).

deprivation of fundamental fairness. To do so corrupts the truth finding process. For purposes of constitutional law, it makes no difference whether the evidence tendered to the jury is false physical evidence or the knowing use of a false statement.

The Supreme Court of Tennessee found that the Housler statement contained many known factual falsehoods. The court recognized that *Mooney* and *Napue*, prohibit a prosecutor's knowing use of false evidence. However, the Supreme Court of Tennessee qualified *Mooney* and *Napue* by concluding the prohibitions did not apply to the knowing use of a defendant's false statement. The court concluded: (1) A defendant's statement with many known factual falsehoods may be admitted as evidence against the defendant if one minimal fact is corroborated; and (2) It is the jury's role to resolve what is true and what is not.[24] This determination by the Supreme Court of Tennessee not only conflicts with the strict prohibitions of *Mooney* and its progeny, but promotes corruption of the truth finding process that is the fundamental purpose of trial.

The important federal question here is whether or not the Supreme Court of Tennessee is correct in carving an exception to *Mooney*? Should *Mooney*'s prohibition against the knowing use of false evidence be qualified when the false evidence is the defendant's statement? If *Mooney* is so qualified, then the Supreme Court of Tennessee is correct and prosecutors may knowingly admit false statements by the defendant. If this *Mooney* exception does not exist, then the Supreme Court of Tennessee is wrong and this Court should grant the Writ of Certiorari to correct and resolve this important federal question.

Any analysis of whether or not the *Mooney* prohibition against the knowing use of false evidence should be qualified

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[24] Pet. App. A 21a.

in this circumstance should begin with a clear understanding of the simple but important reason for excluding the use of false evidence. False evidence is excluded because it corrupts the truth seeking function of the trial process. *United States v. Agurs*, 47 U.S. 97, 104 (1976). Certainly, there should be no argument about the common obligation to protect the truth seeking function of the trial process against any avoidable threat. Perhaps, of the various roles of this Court none is more important than using due process guarantees to assure that the American trial process is best calibrated to determine the truth. In view of this purpose, and common goal, the Supreme Court of Tennessee's qualification of the prohibition against the knowing use of false evidence becomes illogical and dangerous.

It is elementary and universally accepted that the role of the jury is factfinder. This means that the jury is expected to resolve disputed issues of fact. When the parties agree upon a fact, the fact is not disputed. If the parties agree that a fact is true, and the fact is relevant, then the parties may stipulate or otherwise indicate that the fact is true and not disputed. If the parties agree that a fact is false, then the fact is also not disputed, and it becomes illogical to put the fact before the jury without informing the jury that the fact is false.[25] This Court should examine these questions:

> 1. Should a trier of fact, jury or otherwise, be allowed to consider a fact which both parties know is false without being so informed?
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> 2. Does it make any difference if the known false fact is the sworn testimony of a witness or the statement of the defendant?
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> 3. If the purpose of the jury is to resolve disputed facts, is this purpose corrupted or frustrated by pre-

[25] In most circumstances it is illogical and inefficient to put a false fact before the jury at all.

senting the jury with facts that both parties know are false?

In *Banks v. Dretke*, 540 U.S. 668 (2004) this Court held that when prosecutors conceal significant exculpatory or impeaching material, it is ordinarily incumbent on the State to set the record straight. This Court rejected several arguments by the State of Texas designed to shift the burden of correcting the record to the defendant. ["A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant's due process."] *id.* In the case *sub judice* the Mooney exception, suggested by the Supreme Court of Tennessee, is the same burden shifting proposition which would require a defendant to prove falsity when both parties know and admit the falsity. It is both illogical and inefficient, in view of the truth seeking function, to ask the jury to wander through a maze of cross examination and contradictory testimony to determine that a fact is false, when both parties know the fact is false.[26] Since *Mooney* this Court has always placed the burden to correct known falsity squarely on the prosecution. The Supreme Court of Tennessee's *Mooney* exception places the burden to correct on the defendant and requires the defendant to do it through the adversarial trial process.

In *United States v. Bagley*, 473 U.S. 667 (1985) this Court stated that if the defendant established that the prosecution presented and did not correct false testimony, the falsity will be "considered material unless failure to disclose it would be harmless beyond a reasonable doubt." id. at 680. There can be little doubt that the admission of the Housler statement "with many known factual falsehoods"[27] was material and preju-

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[26] "It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutor's submission as truthful." *Banks v. Dretke*, 540 U. S. 668 (2004).

[27] Pet. App. A 12a, 19a.

dicial error. This Court has observed that "A confession is like no other evidence. Indeed the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246 (1991).[28]

A brief look at some of the particular known false facts in the Housler statement demonstrates with clarity the materiality, prejudice, and impact upon the truth seeking function.[29] For example, in the *Mathews*' trial the State of Tennessee established on the night of the murder Mathews worked at Taco Bell until after 9:00 p.m., went home to his apartment four miles away in Clarksville, Tennessee, and prepared for the crime in front of his roommates. The State used eye witnesses Antaya, Tansil, and Maurizzio to prove that Mathews went back to Taco Bell alone in his own car where he was seen both outside and inside. Later, the State used eye witnesses Sanford and Ceruti to prove that Mathews was inside the Taco Bell, first working with the victims and then alone at 4:30 a.m. The State used witnesses Depto and Dickson to prove where and when Mathews got the weapons. The State used Shawn Depto to prove that Mathews used the shotgun to blow up the Taco Bell safe. As the trial court found and as the District Attorney argued at closing, the Mathews prosecution was not only sole perpetrator but lone actor.[30] [Q. "Did you state to that jury in 1996 General Carney, 'The State of Tennessee says at this point in answering that the evidence in this case is overwhelming, that the evidence in this case points to one person, and that is the

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[28] See also *Bruton v. United States*, 391 U. S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting).

[29] See also Pet. App. J 141a-145a, which is a chart comparing known false facts in the Housler statement with competent proof.

[30] The trial court found that the Mathews prosecution a sole perpetrator both at the Mathews trial and before, during, and after the Housler trial. Pet. App. B 31a-32a; Pet. App. L 190a.

defendant (Mathews) right here' and then you indicated with your finger. 'No one else', you said. Did you say that word, in this room to a jury in the Courtney Mathews' case in 1996? A. Yes, I did." Pet. App. G 101a-102a.]

In the Housler trial the State ignored these witnesses. The State did not call Ceruti, Tansil, Sanford, Depto, Peghee, Dickson, Maurizzio or Antaya. Pet. App. 210a-213a.[31] Each of these eye witnesses offered testimony that supported the lone actor theory in *Mathews*, but debunked the false Housler statement.[32] So the State left these eye witnesses on the sidelines and admitted the false Housler statement. Housler was then required to call each of these witnesses in an effort to prove his statement false, a fact known by both parties. Nothing better demonstrates the manipulation of the truth that always accompanies the admission of false evidence.

The Housler statement falsely claims that Mathews, his girlfriend Kendra Corley, Sulyn Ulangca, Kevin Tween, Melanie Darwish, and Housler were at the Kentucky trailer that afternoon and evening. The statement claims that Housler, Mathews, Ulangca, Tween, and Darwish, all left the Kentucky trailer at about 11:00 p.m., stopped at a market, and then went to Taco Bell, where Tween and Mathews went inside and killed the employees during a robbery. The crime would have happened at about midnight.[33] The State admitted before trial that Mathews was at work at Taco Bell on the day of the murders,[34] and was not in Kentucky, that Corley was

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[31] The substance of each of these witness testimony is accurately described in the opinion of the Supreme Court of Tennessee.

[32] This Court should review the testimony of ADA Garrett who tried the Mathews' case and testified as a witness in *Housler*. Garrett testified that each of these witnesses who were called in Mathews by the State to prove that Mathews acted alone were truthful and that he believed their testimony. Pet. App. K 146a-184a.

[33] Pet. App. I 127a-140a.

[34] Pet. App. D 45a-65a; Pet. App. E 76a.; Pet. App. F 91a-93a.

not in Kentucky,[35] that Mathews went from his home in Clarksville to Taco Bell to commit the murders,[36] that Mathews not Housler secured the shotgun and ammunition,[37] that no one stopped that night at the convenience store, and that Darwish, Ulangca, and Tween were not involved[38]. Although each of these admissions was made before trial establishing these facts as false, the facts were presented to the jury in the statement without correction or redaction. If the State had presented these known false facts through a witness, other than Housler, then the result is clearly reversible error. The result should be the same in this case.

Inconsistent Prosecutions for the Same Crime Present Issues of Due Process Which Are Important Federal Questions Which this Court Should Settle.

Those Important Questions Include:

1. Are due process guarantees implicated by inconsistent prosecutions of different individuals for the same crime?

2. If so, what measure of inconsistency is required to support a due process claim?

3. Are the *Mooney* prohibitions against the knowing use of false evidence and the standards for prosecutorial conduct sufficient to guarantee fundamental fairness in separate prosecutions?

One judge tried both the *Mathews* and the *Housler* case. After the Housler trial Judge Gasaway made two findings that bear directly on the second reason for granting a Writ of Certiorari in this case. First, Judge Gasaway found specific-

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[35] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

[36] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

[37] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

[38] Pet. App. D 45a-65a; Pet. App. E 76a ; Pet. App. F 91a-93a.

ally that the Mathews' prosecution and the Housler' prosecution were inconsistent prosecutions, and in fact, he found that the prosecutions were mutually exclusive.[39] Second, Judge Gasaway specifically appealed for appellate instruction on whether or not prosecutions at this level of inconsistency are legally appropriate.[40] Thus, this case presents the record

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[39] "This Court has said—and I don't think that it has really been objected to by the State, perhaps it—perhaps, but this Court has said repeatedly, and still now believes, that you cannot read the Matthews (sic) transcription, you could not have sat through the trial and believed any other thing than the State of Tennessee believed that Courtney B. Matthews (sic) acted alone in the robbery and the killing of the people employed at the Taco Bell Restaurant."

"That was the theory of the State before the trial; it was the theory of the State at the trial; it was the only conclusion that a reasonable mind could draw: That the State of Tennessee believed that Courtney B. Matthews (sic) acted alone in the robbery and the killing of the victims of the Taco Bell Restaurant."

"Thereafter the State indicted and prosecuted David Housler. And the State offered a theory that David Housler acted in consort with Courtney Matthews; that he was in part—that he helped plan it; that he participated in it and that he engaged in the robbery in some sort of supporting role."

"And the Defendant, Housler, has always said and always maintained that the State of Tennessee should not be able to with a straight face in front of two different juries argue two different theories that cannot be—that are mutually exclusive of one another."

Pet. App.M 207a-208a. See also Pet. App. L190a.

[40] "And it has always been this Court's desire for this Court—for this State through its appellate courts to address the issue: Can the State do that? Is that legal?"

....

"I most respectfully believe that the issue of the—of whether or not the State can prosecute two different people at two different trials on mutually exclusive theories must be addressed by the Appellate Court."

Pet. App. M 208a.

of two trials with a common judge and a finding by the trial judge that the prosecutions are irreconcilable and mutually exclusive. This is an appropriate record for this Court to address this important federal question and related issues in an area of constitutional law which is obviously unsettled.

More than ten years ago Justice Stevens observed that "Serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens. . . ." *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995); quoted in *Bradshaw v. Stumpf*, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005). Recent law journals have recognized the importance of this issue on the integrity of the trial, its unsettled state, and have discussed potential solutions.[41]

The Constitution's *Due Process Clause* guarantees every defendant the right to a fair trial. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-5, 68 L.Ed.2d 640,101 S.Ct. 2153(1981); *Turner v. Louisiana*, 379 U.S. 466, 471-72, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965). This Court has emphasized that "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer . . ., it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88,

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[41] See, e.g. Barry Tarlow, RICO Report: More Prosecutorial Double-Speak, 27 Champion 52, 61 (2004); Steven F. Shatz & Lazuli M. Whitt, The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants, 36 U.S.F. L.Rev. 853 (2002); Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, 89 Cal.L. Rev. 1423 (2001); Michael Q. English, Note: A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?, 68 Fordham L. Rev. 525 (1999).

79 L.Ed. 1314, 55 S.Ct. 629 (1935), *overruled on other grounds; Stirone v. United States*, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960).

Several Circuit Court of Appeal have found, or implied, that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the due process clause. *See, e.g., Smith v. Groose*, 205 F.3d 1045 (8th Cir.2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U. S. 538, 140 L.Ed.2d 728,118 S.Ct. 1489 (1998); *Drake v. Kemp*, 762 F. 2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring); *cf. Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995); *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004) reversed in part, vacated in part, and remanded, *Bradshaw v. Stumpf*, 125 S.Ct. 2398; 162 L.Ed.2d 143 (2005).

In 2005 this Court reviewed the Sixth Circuit's decision in *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004). This Court did not reverse the Sixth Circuit's finding that the use of inconsistent irreconcilable theories to convict two defendants for the same crime is a due process violation. Instead, this Court vacated and remanded the case for further proceedings to determine whether the use of inconsistent theories affected the sentencing panels conclusion. As Justice Souter observed in concurring, *Stumpf* did not present a related Mooney claim.[42] The case *sub judice* is similar to *Stumpf* because it presents a claim of irreconcilably inconsistent prosecution theories. However, this case is different than *Stumpf* because this case also presents a related *Mooney* claim. This case

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[42] "Stumpf's claim as I understand it is not a challenge to the evidentiary basis for arguing the death penalty in either case; nor is it a claim that the prosecution deliberately deceived or attempted to deceive either trial court, as in *Mooney v. Holohan*, 294 U. S. 103 (1935) (per curiam) . . .

would allow the Court to analyze the relationship between inconsistent prosecutions and false evidence.

A due process challenge to the use of inconsistent theories is based on the notion of fundamental fairness; because inconsistent theories render convictions unreliable. Reliability of the process should be a paramount concern of all involved. Prosecutorial inconsistency has many faces. This Court has a history of consistently disapproving prosecutorial inconsistency which impacts the integrity of the process. See *Green v. Georgia*, 442 U.S. 95 (1979) (rejecting prosecutor's attempt to use hearsay rules to prevent defendant from presenting evidence that the prosecutor previously used to convict another defendant of the same crime.); *Miller v. Pate*, 386 U.S. 1 (1967) (condemning prosecutor's use of inconsistent theories in a case involving prosecutor's knowing use of false testimony.)

The Sixth Circuit's decision in *Stumpf* and the Supreme Court of Tennessee's decision in this case cannot be reconciled. In *Stumpf* the Sixth Circuit specifically found that inconsistent prosecutions may present a due process claim. ["On this issue of first impression in this Court, we now join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation." supra at 611.] Further the Sixth Circuit found that a due process claim is subject to de novo review and adopted a standard of review. ["The proper standard of review is whether there is reasonable probability that the prosecutors use of inconsistent irreconcilable theories rendered the conviction unreliable." supra at 616.] The Supreme Court of Tennessee refused to review this case as a due process claim, despite the findings of the trial judge that the *Mathews*' prosecution, sole perpetrator/lone actor, and the *Housler* prosecution, multiple perpetrators, were irreconcilably inconsistent and mutually exclusive. Tennessee is in the Sixth Circuit and this Court should issue a Writ of

Certiorari to resolve the conflict between the Sixth Circuit and the Supreme Court of Tennessee, and determine whether or not a due process claim exists for irreconcilably inconsistent prosecutions.

CONCLUSION

The Supreme Court of Tennessee has created an exception to *Mooney* and sanctioned the knowing introduction of false evidence in criminal trials. This Court has scrupulously refused to allow false evidence in any guise without exception. The Ninth Circuit recently observed *en banc*:

> In closing, we must observe that this case is not merely about a peculiar circumstance. As we have noted, this is not the first time we have been confronted in recent years with schemes to place false or distorted evidence before a jury. Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened.

Hayes v. Brown, 399 F.3d 972,988 (9th Cir. 2005).

The threat to fundamental fairness posed in the form of false evidence exists as much today as when this Court decided *Mooney*. False evidence should have no role in the truth seeking process. No exception should be tolerated. We respectfully pray that a Writ of Certiorari will issue to the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX A - Opinion, Supreme Court of Tennessee

SUPREME COURT OF TENNESSEE,
at Nashville

No. M2002-00419-SC-R11-CD
February 2, 2006 Session

STATE OF TENNESSEE,

v.

DAVID G. HOUSLER, JR.

May 19, 2006

WILLIAM M. BARKER, CHIEF JUSTICE.

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, we granted review principally to determine whether the State violated the Appellant's Due Process rights (1) by introducing into evidence at his murder trial the Appellant's confession, which contained several known falsehoods, or (2) by advancing allegedly inconsistent theories, arguments, and facts in the Appellant's and his co-defendant'srespective prosecutions. We hold that a criminal defendant's confession may be used against him consistent with Due Process protections even when the confession contains peripheral facts known by prosecutors to be false. Further, we hold on the facts presented to us in this case that the State did not pursue inconsistent prosecutions in the respective trials of the Appellant and his co-defendant and that, therefore, we need not address whether a criminal defendant's Due Process rights could be violated by such inconsistency.

FACTUAL BACKGROUND

On January 30, 1994, officers of the Clarksville, Tennessee, Police Department discovered the bodies of Kevin Campbell, Angela Wyatt, Patricia Price, and Marcia Klopp inside a Taco Bell restaurant. Each of the four victims, all of whom were employees of the restaurant, suffered multiple gunshot wounds. Officers also discovered that a safe in the business office of the restaurant had been blown open by a shotgun blast and emptied of nearly $3,000 in cash and coins.

The crime garnered local outrage and national media attention, and within days Courtney B. Mathews, a newly-hired part-time employee of the restaurant, was arrested and charged with the murders and robbery. Mathews was also a military soldier stationed at nearby Fort Campbell, Kentucky.

Work records showed that on January 29, 1994, Mathews clocked in to work at 2:10 p.m., clocked out for a break at 7:39 p.m., clocked back in at 8:12 p.m., and ended his shift at 9:11 p.m.

Mathews resided on Ryder Avenue in Clarksville, four to five miles from the Taco Bell on Riverside Drive. According to Carl Ward, Mathews' roommate at the time, Mathews arrived home from work at 9:30 p.m. on the night of the murders and went into his room where he placed a shotgun, a .9 millimeter handgun, and either a .22 or .25 handgun, along with shells and ammunition, in a book bag. Mathews also grabbed a bowling-ball bag and a pair of white latex gloves and left the apartment alone. Ward testified that when Mathews left the house, he was wearing two layers of clothes—a Miami Hurricanes sweat suit underneath black pants, a white shirt and a tie, and a bla three-quarter length coat. Before he left, Mathews told Ward, who had been examining the guns, to wipe his prints from them.

About an hour after Mathews left work on the evening of January 29, a Taco Bell employee, Jelaine Walker, saw

Mathews inside the restaurant again. Walker observed Mathews crouching behind a trash can in the dining area. Mathews said to Walker, "I am gone, you don't see me." Company policy prohibited entry of anyone into the restaurant once the dining area was closed at midnight; the drive-through lane generally remained open until 1:00 or 1:30 a.m.

Investigation of the crime scene revealed a disrupted ceiling tile in the men's bathroom that appeared to have been moved to create an opening after someone had been hiding above. A forensic specialist from the Tennessee Bureau of Investigation (TBI) later confirmed that Mathews' fingerprints were on a fan vent near the displaced tile.

Witness Frankie Sanford placed an order from the drive-through lane of Taco Bell at 1:30 a.m. on the day of the murders. Inside the restaurant he saw, alive and well, each of the four victims working as normal; he also saw Mathews, in uniform, working.

When John Ballard, a shift manager at the Taco Bell, stopped by the drive-through window at approximately 1:45 a.m., the employees were engaged in normal closing activities. Klopp, the evening manager at Taco Bell on the night of the killings, told Ballard that they had been very busy and hence were unable to close the drive-through window until 1:30 a.m. Ballard left the restaurant around 2:00 a.m.

Witness Allen Ceruti, who at the time was employed by the Tennessee Department of Correction, drove by the Taco Bell at 4:30 a.m.on the day of the murders. He testified that he saw an African-American male partially open the metal rear door of the Taco Bell restaurant from the inside. Mathews is African-American.

When Ballard arrived later the next morning at approximately 7:25 a.m. to open the restaurant, he noticed that the employees' cars were still in the parking lot. After unlocking the main entrance, Ballard entered the Taco Bell and

discovered one of the victim's bodies. He left and immediately called 9-1-1. Police arrived shortly thereafter, performed a sweep of the building, and found the bodies of the four victims inside. TBI agents were soon called to collect evidence from the crime scene.

In the general work area of the restaurant, twenty-four cartridge cases, all fired from a .9 millimeter gun, were recovered. Eight fired bullets were also found lodged in various places throughout the restaurant. Investigators determined that the cartridge cases, the fired bullets, and the bullet fragments recovered from the victims' bodies were all fired from the same .9 millimeter gun. The office safe had been broken into after the combination dial was shot off. According to forensic investigators, two different guns, a shotgun and a .9 millimeter, had been used to shoot the safe. Found inside the business office of the restaurant were a Federal brand lead-slug shot shell case, lead fragments from the slug, and an unfired Federal lead-slug shot shell—along with plastic fragments from the safe dial. An audit later revealed that exactly $2,967.68 had been taken from the restaurant.

On the day of the murders, David Lee Rose was working at the McDonald's near 1-24 in Clarksville. While he was emptying the trash, he discovered inside several unfired .12 gauge shotgun shells and numerous .9 millimeter bullets (some of which had been chambered in a weapon), some coins in wrappers, a black wallet, and a black leather glove. He also disposed of two half-eaten hamburgers that were in the bag with the other items. Rose took the ammunition and change home with him. He did not keep the glove or the wallet. When Rose learned about the murders, he returned the shells and bullets to his store manager. Investigators later determined that the chamber markings on the shotgun shells that Rose found matched those on the shotgun shells collected from the crime scene. The chamber markings on the .9

millimeter bullets that he found, however, did not match those found on the bullets collected from Taco Bell. A search of Mathews' car yielded a bowling ball bag containing $2,576 along with a collection of credit and identification cards strewn about the car's interior.

Investigators of the Clarksville Police Department searched for evidence along the interstate. Underneath the Red River Bridge on 1-24, they collected several items of clothing, pieces of a latex glove, and other sundry items. One of the clothing items recovered was a three-quarter length black jacket. Forensic investigators determined that a stain on the jacket was the blood of victim Kevin Campbell. Also, plastic fragments lodged in the coat were determined to be of the same type plastic as the plastic dial blown off the safe.

Ward, Mathews' roommate, identified the coat as the one that Mathews was wearing on the night of the murders; he also testified that he had not seen the coat since that time and that Mathews, when he left their apartment on the night of the murders, said that no one would see the clothes he was wearing again. Ward further stated that on the following Tuesday after the murders, Mathews attempted suicide in their apartment. On this evening, Mathews told Ward, while crying, "I don't deserve to live. I killed four people."

Between the Sunday of the murders and the Tuesday that Mathews attempted suicide, Mathews told Shawntea Hooks, Ward's then-girlfriend, how he believed the perpetrator committed the crime:

> Well, he told me that whoever did it, they went into the Taco Bell before it closed. They went into the men's bathroom and climbed into the ceiling, waited until the store closed. They came down . . . and he said they killed twopeople in the front of the store and two in the back.

Shawn Peghee worked with Mathews at Fort Campbell in the mailroom. On the Friday before the murders, Mathews

asked Peghee questions about the safe in the mailroom and whether one would be able to get inside by shooting it. According to Peghee, as Mathews left the mailroom, "he sort of looked back at me with a smile on his face, sort of a smirk, and he said something big was going to happen that weekend."

During the time that Mathews worked at Taco Bell, he asked Assistant Manager Deann Rivaf if anything was stored in the ceiling.

Fitz Dickson, who had known Mathews for eleven years, testified that he purchased a .9 millimeter gun for Mathews in 1993. Dickson also testified that he saw Mathews buy ammunition for the gun on the same day that he purchased it for him.

During a search of Mathews' residence, investigators recovered several bullet fragments that Mathews had fired into the floor of his bedroom during an argument with his estranged wife sometime before the murders. Investigators also collected several unfired rounds. A TBI forensic scientist testified that a cartridge case and numerous bullet fragments recovered from Mathews' apartment came from the same .9 millimeter weapon as the cartridges and bullets recovered from the crime scene and the victims' bodies. Shells provided to investigators by Shawn Depto, who loaned Mathews a shotgun and some shells, had the same chamber markings as those recovered at McDonald's. On November 21, 1995, a plastic bag containing a disassembled Winchester shotgun was found behind Mathews' residence. After reassembling the shotgun, forensic examiners determined that the lead slug used to shoot open the Taco Bell safe was fired from this shotgun. The shells provided by Depto and those recovered from McDonald's also matched the slug and shells collected from Taco Bell. Depto also identified this shotgun as the one he loaned Mathews.

In June 1994, a jury convicted Mathews of the robbery of the Taco Bell and the murders of the four employees. He was sentenced to life imprisonment without parole.

On March 7, 1994, TBI Agent Jeff Puckett and Detective George Elliott of the Clarksville Police Department interviewed David G. Housler, Jr., at Fort Campbell, Kentucky. Housler was also a solider stationed at Fort Campbell; at the time, he had been detained by military authorities for being absent without leave. Detective Elliott suspected Housler of an unrelated robbery that occurred in front of Grandpa's Hardware Store in Clarksville about a week before the Taco Bell murders. During the course of the interview, Housler denied involvement in the Taco Bell murders and stated that on the night of the killings he attended a party with friends at Kevin Tween's mobile-home trailer in Oak Grove, Kentucky. His best recollection was that he stayed there all night with his girlfriend, Sulyn Ulangca. He also stated that on January 21, a week and a day before the murders, he and Sulyn may have attended a party at the same trailer; he further stated that he did not personally know Mathews and did not meet him at that particular party. He denied any role in the robbery outside the Grandpa's store as well. Housler was later arrested for that robbery.

While in jail on the aggravated robbery charge, Housler informed his lawyer, Larry McMillan, that he had information about the Taco Bell murders. McMillan negotiated an agreement with Clarksville District Attorney General John Carney that Housler would provide information and serve as a witness against Mathews in return for a reduced bond and a lesser charge for the Grandpa's robbery. Housler gave a statement on March 21,-1994, outlining the following: He met Mathews during a party at the trailer in Oak Grove, Kentucky on January 21, 1994. Mathews said in the presence of several people, including Housler, that he had a place to rob—his place of work—and that when he did it, he would not leave

any witnesses. He also stated that once he committed the robbery, they could read about it in the newspapers. Housler said that he did not see Mathews again until March 15, when the two were in jail. Housler claimed that Mathews admitted committing the Taco Bell murders and giggled about it. Mathews also claimed to have attempted suicide while in jail. Housler also mentioned that his first statement to investigators on March 7 was not truthful because he did not want to get involved. After giving this statement on March 21, Housler was released on bond, and he returned to Kentucky.

During October 1994, prosecutors asked Housler to return to Clarksville to resolve some inconsistencies between his statements and information gathered from other sources. On October 11, Housler admitted to "gassing up"[1] Mathews to commit the robbery. Apparently, at this point Housler's status changed from witness to suspect. On October 19, prosecutors entered into a proffer agreement with Housler whereby Housler would receive a recommended sentence of fifteen years for conspiracy to commit murder and four years for the unrelated robbery, to be served concurrently, in return for providing truthful information about the Taco Bell murders and serving as a witness against Mathews.

On October 20, 1995, Housler and his attorney met again with Carney and others. During this interview, Housler gave a written statement, which relayed the following information: Housler met Mathews at the trailer in Kentucky about a week before the Taco Bell murders. At the party, Mathews, Housler, and Charlie Brown talked about robberies and other crimes that each had committed. Housler said that he bragged about committing the robbery outside Grandpa's. Mathews brought up the idea of robbing the place where he worked. Mathews said he would go in and leave no witnesses. Housler told Mathews that he doubted he would commit the crime

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[1] That is, to encourage or persuade Mathews to commit the crimes.

but, if Mathews would, he would go with him. When Housler asked Kevin "Red" Tween if he knew about the plan, Tween responded, "[W]hatever, whenever." Melanie Darwish then approached Housler and Mathews and said she would participate as well. Housler stated that Mathews was carrying a .9 millimeter handgun under his clothes at this party. On January 29, 1994, Housler arrived with Sulyn Ulangca at the trailer around nightfall. Mathews was in the trailer with Tween, Darwish, Kendra Corley, and Dana Ulangca (Sulyn's brother). Tween told Housler that "tonight is the night" for robbing the Taco Bell, and he asked Housler to get some ammunition. Housler left the trailer and visited someone called "Hippie Dude," who sold him a box of shotgun shells and box of .9 millimeter bullets. Housler returned to the trailer at around 11:00 p.m. Dana Ulangca was asleep, and Kendra Corley had left. Sulyn immediately pleaded with him not to participate in the robbery. While Houser argued with her, the others started to plan the robbery and killings. Housler did not hear the details. By the time Housler's argument with Sulyn ended, the group was ready to leave. Housler drove his white Tracer, and Darwish drove her red Tempo. Tween was wearing a dark-blue hooded jacket and blue jeans, and Mathews was wearing a black knee-length jacket. The group stopped at the Minit Mart for beer and cigarettes. On the ride to Taco Bell, Mathews told Tween to get the register, and he would take care of the safe. Tween had a .9 millimeter pistol, while Mathews seemed to have the shotgun—a twenty-four inch Mossberg pump—stuffed under his coat. However, during the drive, Mathews told Housler that Corley placed the guns in a trash can at the restaurant where they would be available to him. Housler had his .9 millimeter handgun.

Housler also related in his written statement that, upon arriving at the Taco Bell, he pulled up to the drive-through window. Mathews exited the car and tapped on the window, which was opened by a heavy-set woman with brown hair.

Mathews stated that he needed to get inside to retrieve his wallet or driver's license. During this time, Housler saw Darwish's car in the mall parking lot. Tween then told Housler to keep the car running and that if anyone pulled up to the restaurant to honk the horn twice and leave. Tween got out of the car and ran behind the dumpsters. Housler decided not to go inside because he was fighting with Sulyn. He pulled up parallel to the main double doors of the restaurant. Housler saw Mathews and thewoman walk toward the counter area near the bathrooms. After about twenty minutes, he heard ten to fifteen loud pops from inside the building, which lasted for about two to three minutes. After the pops stopped, Housler heard a loud bang, which "sounded like a metal door being swung open[,]" and within seconds he saw Tween run from behind the Taco Bell to the dumpsters. Next, he heard a similar bang and then saw another person exit the Taco Bell and run in the direction of the dumpsters. He put the car in gear and drove, almost hitting an older model Chevelle with a Tennessee license plate starting "DFN." He stated that Darwish drove the getaway car with Tween and Mathews inside. Housler drove to the nearby Dingo Boot parking lot, where the group had previously agreed to meet. Darwish pulled up soon after with Mathews and Tween. Mathews got out of Darwish's car, opened the trunk, and threw in the shotgun and a Taco Bell bag; Tween got out and threw in his pistol. Housler then asked Tween what happened. Tween said Mathews took all the employees in the back and "flipped out." Tween told Housler to leave, and Housler returned to the trailer. Tween and Darwish arrived at the trailer about thirty minutes later without Mathews. Housler asked where his cut of the money was, and Tween said that Mathews would bring it later. Tween also said that Mathews shot the victims in the head "gangster-style" to ensure that they were dead. Housler left the trailer an hour later, telling Tween to wait there for his cut of the money. Housler mentioned that Mathews said that he got $1,500 from the

robbery. Housler drove to Jennifer Ellis's house and stayed there until 6:00 p.m. that same day. He went back to the trailer and asked Tween for his money, but Tween said that Mathews had not returned. Housler left his car on the road where Jennifer Ellis lived because he thought it would be connected to the murders. He believed that police later impounded his car. Housler stated he did not see Mathews again until they met in jail.

Investigators contacted Sulyn Ulangca in North Carolina; she could not corroborate Housler's statement. When Ulangca returned to Tennessee to confront Housler, he did not want to see her and confessed to implicating an innocent person. Prosecutors informed Housler that he had breached the agreement and that they were revoking it. Housler then attempted to run but was caught and taken to jail. Prosecutors immediately sought an indictment from the grand jury based on his October 20 written statement.

On November 7, 1995, Housler was charged with four counts of premeditated murder, four counts of felony murder, and one count of especially aggravated robbery. The State filed a notice of intent to seek the death penalty. The State later withdrew its notice and filed notice of intent to seek life without parole. On September 3, 1997, the State obtained a superseding indictment, which charged only four counts of felony murder.

Housler's trial was held November 12 through 21, 1997, more than a year after Mathews' trial. Because Mathews' prosecutors were potential witnesses in the Housler trial, a different prosecutor, District Attorney General Robert "Gus" Radford, conducted the State's case against Housler.

From our reading of the Housler trial transcript, it appears that General Radford's strategy was (1) to establish Mathews' guilt in committing the Taco Bell robbery and murders by using many of the same witnesses and much of the same

evidence that the prosecution used at Mathews' trial and (2) to establish Housler's guilt in the same crimes by using his written statement, which placed him with Mathews as a lookout on the night of the killings, and with the testimony of several corroborating witnesses.

Housler objected to the introduction of his written confession at trial on the ground that it was substantially false. The trial judge overruled this objection, and the statement was admitted. During their respective testimonies at trial, both District Attorney General John Carney, a prosecutor at Mathews' trial, and TBI Agent Jeff Puckett, who took Housler's statement, admitted that significant portions of Housler's statement were false. Carney admitted that he presented evidence at Mathews' trial that Mathews purchased all the ammunition used in the crime. This evidence conflicted with Housler's story that he purchased the ammunition from "Hippie Dude"; in fact, investigators contacted "Hippie Dude" in Michigan, and he denied Housler's account. Carney admitted to arguing that Mathews hid in the ceiling of the Taco Bell, which conflicted with Housler's account that Mathews got inside the restaurant by saying he needed to retrieve his wallet and that he left after fifteen to twenty minutes. Carney admitted that Housler's statement that Mathews was at the trailer on January 21 was not true—in fact, Taco Bell records showed that Mathews was at work at that time. Carney admitted that Housler implicated innocent people, most notably Sulyn. Carney stated that Minit Mart could not verify that Housler, Tween, and Mathews entered the store on the night of the murders. Agent Puckett testified that he did not consider truthful Housler's statement that Mathews and Corley were at the trailer at dusk on January 21 because their respective employers' records showed that they were both at work during that time. Puckett also admitted to testifying at Mathews' trial that the Hippie Dude story could not be confirmed. He further conceded that the Grandpa's

robbery occurred on January 23 and that therefore Housler's story that he bragged about it on January 21 was false.

Relevant portions of the testimony presented at Housler's trial included the following: Michele Antaya testified that on January 29, 1994, at approximately 11:15 p.m., she stopped at the Taco Bell drive-through window. According to Antaya, she saw an African-American male walk from behind the Taco Bell dumpsters toward her car. She described him as around five feet ten inches tall, stocky, and with short hair shaved on the sides. She testified that he was wearing a dark jacket with a hood and dark pants. This description matched Mathews.

Yowanda Maurizzio went through the Taco Bell drive-through at about 1:15 a.m. on January 30, 1994. She observed a black male speaking with a black female inside the restaurant. Only one other African-American male besides Mathews was employed at the restaurant, and he was not on duty the day of the murders.

Frankie Sanford testified that he was at the Taco Bell drive-through about 1:30 a.m. on January 30. He said that he saw Mathews dressed in his Taco Bell uniform working inside the restaurant.

Jacqueline Dickinson stopped at a traffic light in front of the Taco Bell around 2:40 a.m., looked into the restaurant, and saw a white male at the counter looking toward the Long John Silver's lot next door. According to Dickinson, the man was wearing a long green jacket with a big hood and a dark pair of jeans. She described the man as five feet nine inches to six feet tall, medium build, with short hair brown hair cut in a military style. She also saw in the Taco Bell parking lot a white car "facing inward towards the building." The car was not in the same position as a white car owned by one of the victims that was parked there that night.

Damien Cromartie stopped at the Taco Bell around 3:00 a.m. He observed a few vehicles in the parking lot and a brown or burgundy sedan parked in the Two Rivers Mall parking lot behind the Taco Bell. When he pulled into the drive-through lane, he saw a large piece of cardboard in the window. On the cardboard he saw the silhouettes of two or three people moving around inside the restaurant.

Bill Hudspeth testified that, between 2:00 and 2:30 a.m. on January 30, 1994, he drove by the Taco Bell and saw a white male run diagonally from an area behind the restaurant to the front of his car and then toward a muffler shop across the street. Hudspeth described the male as between five feet nine inches and six feet tall, with short hair, and a stocky build. Hudspeth said another white male with short hair, a stocky build, and a bit taller than the other individual was standing near the muffler shop.

Mark Jolly testified that he was in the Shoney's parking lot across the street from the Taco Bell between 2:30 and 3:00 a.m. on January 30, 1994, when he heard two loud bangs and saw a man running from the back of the Taco Bell. According to Jolly, the man was a Puerto Rican or a light-skinned African-American male, wearing shorts, and carrying something rolled up in a brown bag in his left hand. After he saw the man, Jolly observed the lobby lights in the Taco Bell flicker on and off two or three times.

Allen Ceruti testified that he passed by the Taco Bell between 4:20 and 4:30 a.m. He observed an African-American male standing at the open back door.

Charlie Brown testified that Mathews and Housler were both at a party together at the trailer in Oak Grove, probably on January 21. During his testimony, Brown recanted a statement he made in November 1995, wherein he said that he heard Mathews talking about robbing the place where he worked.

Melanie Darwish testified that she may have lent her car to Housler on the night of the robbery and murders, although she was not sure. According to Darwish, she was at home in bed on that night. Darwish said that Mathews had been at a party at the trailer; however, she did not remember Housler being there.

Lopez Gaddes, a convicted drug trafficker, was in the Montgomery County Jail with Housler in 1994. Housler told Gaddes that he knew Mathews and that Housler, Charlie Brown, and Mathews had conversations about robbing the Taco Bell. Housler told him that the first conversation about the robbery took place at a party a week or two before the murders. Housler also told Gaddes that the group again talked about committing the robbery at the barracks. When Gaddes asked Housler if he was scared, Housler responded that he was not because Mathews acted as the trigger man.

Jason Carr testified that he was incarcerated with Housler in the Montgomery County Jail during March 1994. During a card game with Housler and Charlie Brown, one of the two men (he could not remember which) stated that Housler's car was used in the getaway of the Taco Bell murders.

Larry Underhill, another inmate, testified that Housler told him, while the two were in jail, that he killed the Taco Bell employees. Underhill said that Housler told him that the victims were shot execution-style. Housler also asked Underhill about the possibility of redemption for sin.

Christopher Ester, a convicted felon, frequently visited the trailer in Oak Grove. Ester testified that he saw Mathews at the trailer on January 29, 1994. Mathews talked about the robberies he had committed. According to Ester, Mathews and Housler had a conversation that night. Ester testified that Mathews left the trailer around 12:30 or 1:00 a.m. and that Housler left about 2:30 or 3:00 a.m. after he and Ulangca got into an argument. Housler was supposed to call and let the group know his whereabouts, but he never did.

Orlando Gill also visited the trailer. He believed that he met Mathews the weekend before the murders, when Kendra Corley brought Mathews to the trailer. He observed Housler and Mathews conversing in the kitchen.

Hector Ortiz also saw Mathews at the trailer with Corley before the murders. He likewise observed Mathews and Housler conversing. Ortiz was at the trailer on the night of the murders, and he saw Housler and Ulangca there but not Mathews. When he left around 1:00 a.m., neither Housler nor Ulangca was present in the trailer. When he returned to the trailer around 2:30 or 3:00 a.m., the couple still was not there.

Kendra Corley testified that Mathews did not go to a party at the trailer on January 21, 1994, because he was working. Corley stated that she did bring Mathews to the trailer on Saturday, January 22, and they arrived between 9:30 and 10:00 p.m. Corley stated that she did not go to the trailer with Mathews on January 28. According to Corley, Mathews gave her $ 255 in five-dollar bills just before his suicide attempt. Corley also identified the black jacket as belonging to Mathews.

James Bowen testified that Corley brought Mathews to the party a week before the murders. Bowen overheard Housler and Mathews discussing the robbery of Taco Bell. According to Bowen, Housler and Mathews argued over who would do the shooting and who would be the lookout. Bowen testified that Mathews stated they would rob Taco Bell because, since Mathews worked there, it would be easier for them. Bowen stated that he saw Housler and Ulangca go into the trailer's bedroom about 2:00 a.m. and that they were still there when he woke up.

Housler testified in his own defense. He denied any involvement in the robbery and murders. He asserted that his October 20 statement was wholly false and concocted from jailhouse rumors and newspaper reports. Housler claimed that

in order to get out of jail he lied about knowing of Mathews' involvement in the crimes. He also asserted an alibi defense, saying that he was with Sulyn the entire night of the murders.

At trial, Sulyn Ulangca now claimed that Housler was with her on the night of the murders. But she also admitted that she previously was unable to account for Housler's whereabouts on the night of the killings.

Following the conclusion of the evidence, the jury found Housler guilty on four counts of felony murder and imposed a punishment of life imprisonment. After a sentencing hearing on December 12, 1997, the trial court ordered Housler's sentences to be served consecutively. Following extensive filings by both parties and three hearings on Housler's motion for a new trial, proceedings on the motion were completed on July 3, 2000. On February 5, 2002, the trial court summarily denied Housler's motion for a new trial. Housler filed a timely appeal; the Court of Criminal Appeals ruled against him on every issue he presented, most of which are the same or similar to those he argues here.

ANALYSIS

The Appellant alleges several distinct violations of his State and federal Due Process rights stemming chiefly from the introduction into evidence of his confession. First, the Appellant notes that prosecutors knew that many facts in his confession were false and argues that the State cannot knowingly use any false evidence against him—even when such false evidence is part of his own confession. Second, the Appellant argues that prosecutors unconstitutionally pursued "inherently factually inconsistent theories" in his and Mathews' respective trials. The Appellant also argues that he is entitled to a new trial because a prosecution witness recanted his testimony. Finally, the Appellant claims convincing evidence of "actual innocence."

We begin our analysis of these claims by noting that the due process protections afforded to criminal defendants by article I, section 8 of the Tennessee Constitution mirror the protections afforded by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003).

A. PROSECUTORS' KNOWING USE OF FALSE EVIDENCE

Relying mainly on *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Napue v. Illinois*, 360 U.S. 264 (1959), the Appellant argues that prosecutors' knowing use of false evidence "of any type" at trial violates Due Process guarantees. Thus, the Appellant claims that prosecutors' knowing use of his confession, which contained many facts known to be false, violated his constitutional rights.[2]

We agree with the Court of Criminal Appeals that Mooney and Napue are distinguishable from, and not applicable to, the present case. Both Mooney and Napue concerned prosecutors' knowing use of perjured witness testimony, not the use of a defendant's confession. "[I]n an adversary system it is fair to permit the trier of fact to consider a party's statements in resolving issues about that party." Neil P. Cohen et al., Tennessee Law of Evidence § 8-06[2] (5th ed. 2005). Indeed, the concerns that animated the Court's decisions in Mooney and its progeny differ significantly from concerns that arise with the use of the defendant's own statements. Most notably, perjury will not, for obvious reasons, be a central concern when considering a rational

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[2] We do not interpret the Appellant's argument to mean that the prosecutor knew that Housler was innocent, but rather only that Housler's confession was so inundated with known falsehoods that its veracity should have been doubted by the prosecutor and charges not been brought. But as we explain below, the truth or falsity of the Appellant's confession was a question for the jury.

defendant's freely-given confession. As we explain below, the primary concern when admitting confessions into evidence is not perjury, but voluntariness. Furthermore, as we also explain below, when the truth or falsity of the defendant's voluntary confession is at issue, it is a question for the jury. Moreover, when the defendant's guilt is genuinely at issue, it cannot plausibly be argued, as the Appellant argues here, that the confession itself is known to be false. In this case, the evidence demonstrates the falsity only of many peripheral facts in Housler's statement—for instance, the time that the murders occurred or the precise date that Mathews and Housler discussed the robbery at the trailer. The evidence does not demonstrate what the Appellant would have to show for this argument to have at least some plausibility—namely, that his confession to serving as a lookout was false. Only if the prosecutor had known that the Appellant was innocent of the crime would his confession arguably be inadmissible under Mooney and its progeny—but of course, if that were the case, the prosecutor should not have charged him with a crime. We think it clear that Mooney and Napue do not apply to a criminal defendant's confession.

We recognize that Housler's confession contained many known factual falsehoods—such as the precise date Mathews and Housler planned the crime during a party at the trailer park, the time of the killings, and (perhaps) who acquired the ammunition used in the killings. In answer to the Appellant's argument that these known falsehoods rendered the confession constitutionally infirm as evidence, we think it apparent that Due Process here merely required (1) the trial judge to find, by a preponderance of the evidence, that the defendant confessed voluntarily and (2) the confession be minimally corroborated as required by *Opper v. United States*, 348 U.S. 84 (1954), *Smith v. United States*, 348 U.S. 147 (1954), *Wong Sun v. United States*, 371 U.S. 471 (1963),

and the attendant Tennessee cases cited below.[3] Once these two conditions were satisfied, the truth or falsity of the Appellant's confession, despite the known factual errors it contained, was a determination for the jury. *Wynn v. State*, 181 S.W.2d 332, 329 (Tenn. 1944) ("A confession being admitted, its weight is of course a matter for the jury. That is, the jury is to determine whether defendant made the confession and whether the statements contained in it are true.").

"It is a fundamental doctrine of substantive criminal law that the confessions . . . of a criminal defendant, assuming that they are voluntary, are admissible in evidence." *Laumer v. U.S.*, 409 A.2d 190, 197 (D.C. 1979) (citing Wong Sun, 371 U.S. at 488-89; Smith, 348 U.S. 147; Opper, 348 U.S. at 88-90). Of course, the admissibility of evidence is a question for the trial judge, not the jury, *Lego v. Twomey*, 404 U.S. 477, 490 (1972), and in making the voluntariness determination, the trial judge is to be "uninfluenced by the truth or falsity of the confession." Lego, 404 U.S. at 484. In other words, "the exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve. The sole issue . . . is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden." Lego, 404 U.S. at 484 n.12. Rather, the voluntariness determination "was designed to safeguard the right of

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[3] The Appellant's brief also implies that the confession was an inappropriate basis for bringing charges before the grand jury. But, of course, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). Housler's voluntary confession provided probable cause to issue the indictment. Commonwealth v. Villalta-Duarte, 774 N.E.2d 1144, 1147 (Mass. App. Ct. 2002) (citing Commonwealth v. O'Dell, 392 Mass. 445, 450-451 (1984)).

an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." Lego, 404 U.S. at 485. The Court made clear in Lego that, while the trial judge determines whether the confession was given voluntarily, the jury assesses the truth or falsity of the statements made:

> [The voluntariness inquiry] [i]s not aimed at reducing the possibility of convicting innocent men . . . [nor is it] based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. . . .
>
> Nothing [in the voluntariness inquiry] question[s] the province or capacity of juries to assess the truthfulness of confessions. . . .

92 U.S. at 484-85 (emphasis added). The trial court found that the Appellant's confession here was voluntarily given, a ruling that was affirmed on appeal and that the Appellant does not now dispute. Therefore, the voluntariness prong of the inquiry is satisfied, and we thus hold that the Appellant's confession was properly admitted into evidence.

Although the defendant's confession cannot be admitted into evidence absent a showing of voluntariness, the defendant cannot be convicted, once the confession is introduced, without a minimal amount of corroboration. Smith, 348 U.S. 147, 152 (citing, inter alia, *Warszower v. United States*, 312 U.S. 342 (1941)). In other words, the defendant cannot be convicted solely on the basis of his voluntary confession. *State v. Smith*, 24 S.W.3d 274, 281 (Tenn. 2000). The rationale for requiring something more than a voluntary confession to convict is that, as one commentator has written, "[s]ince juries are likely to accept confessions uncritically, the demand for corroboration provides a minimal requirement assuring that an untrustworthy confession alone will not lead to conviction." 1 John W. Strong, McCormick on Evidence

556 (4th ed. 1992) (quoted in *Jones v. County of Maricopa*, 6 P.3d 323, 327 (Ariz. Ct. App. 2000)). Therefore, as a supplement to the voluntariness requirement, the corpus delicti ("body of the crime") must be corroborated:

> The rule . . . is that while the corpus delicti cannot be established by confessions alone, yet the confessions may be taken in connection with other evidence, direct or circumstantial, corroborating them, and, if from all of the evidence so considered together the corpus delicti and the guilt of the person with reference thereto is established beyond a reasonable doubt, it is the duty of the jury to convict.

Ashby v. State, 139 S.W. 872, 875 (Tenn. 1911). Unlike the voluntariness prong discussed above, the corroboration rule "does infringe on the province of the primary finder of facts . . . [and] restrict[s] the power of the jury to convict." Smith, 348 U.S. at 153. Due Process is violated when the jury convicts on the basis of the defendant's confession absent corroborating evidence of the corpus delicti. Smith, 24 S.W. 3d at 281.

We agree with the appeals court that the corroboration requirement does nothing to aid the Appellant here. Corroboration of the corpus delicti is a "low threshold[,]" Smith, 24 S.W.3d at 282; the state needs "only slight evidence . . . to corroborate a confession and sustain a conviction." *Id.* at 281. Moreover, when there is a written confession [then] the corroborative evidence . . . need not be as convincing as the evidence necessary to establish a corpus delicti in the absence of any confession. This evidence is sufficient if of itself it tends to connect the defendant with the commission of the offense, although the evidence is slight, and entitled, when standing by itself, to but little consideration. Thus when we have a verdict even though founded on slight evidence of corroboration connecting the defendant with the crime, it cannot be said, as a matter of law, that the verdict is contrary

to the evidence.

Ricketts v. State, 241 S.W.2d 604, 654-55 (Tenn. 1951). Furthermore, corroboration of the corpus delicti may be achieved with circumstantial evidence alone. *State v. Jones*, 15 S.W.3d 880, 891 (Tenn. Crim. App. 1999). We also stress that while "[a]ll the elements of the offense must be established by independent evidence or corroborated admissions, . . . one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." Smith, 348 U.S. at 156. In sum, as long as this very modest corroboration requirement is satisfied, the ultimate truth or falsity of the defendant's confession is a determination left to the jury.

We think it obvious, as did the Court of Criminal Appeals, that the Appellant's confession was sufficiently corroborated. We need not recite here all the evidence that corroborates the Appellant's confession, but rather will point only to a few examples: Numerous witnesses corroborated the Appellant's account of his meeting with Mathews at the Oak Grove trailer park sometime before the murders. Several witnesses also corroborated the Appellant's statement that Mathews wore a dark, knee-length coat on the night of the murders—a coat stained with the blood of one of the victims. The Appellant's own statement about hearing a loud noise that sounded like a metal door slamming was corroborated by the existence of a metal door at the rear of the Taco Bell restaurant. Witness Jacqueline Dickinson, who saw a white male inside the restaurant wearing clothes similar to those described by the Appellant, corroborated the Appellant's account of Kevin Tween's presence in the Taco Bell at the time of the killings. Perhaps most important, Dickinson also testified that she saw a white car parked in front of the Taco Bell on the night of the killings, which corroborated the Appellant's story that he drove to the crime scene in his white Tracer. Many more

examples could be noted. The Appellant's confession was sufficiently corroborated by the evidence.

We hold that the Appellant's confession was properly admitted into evidence for the jury's consideration. Because his statement was made voluntarily, Due Process was not violated by its admission into evidence. Because the statement was sufficiently corroborated, the jury had the requisite basis, along with other proof establishing Housler's guilt beyond a reasonable doubt, for convicting him. Furthermore, the prosecution did not attempt to corroborate known falsities that the confession contained, but rather only those portions that it believed were true. The Appellant's claim denying the veracity of the confession was for the jury to resolve. Myriad procedural mechanisms were available to him at trial to test the statement's truth, including cross-examination of the prosecution's witnesses, the opportunity to present evidence, and the opportunity to testify. We conclude that all the process due the Appellant concerning his "false" confession was provided at trial and that his substantive Due Process rights were not violated on this score.

B. PRESENTATION OF INCONSISTENT PROSECUTIONS

Relying chiefly on *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), and a recent decision of the United States Supreme Court in *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005), the Appellant further claims that the State prosecuted Mathews and himself using "inconsistent theories, facts, and arguments" in violation of his Due Process rights. Specifically, he claims the prosecution pursued a "lone perpetrator" theory at Mathews' trial and a "multiple perpetrator theory" at his own trial that, considered together, are "inherently factually inconsistent[,]" cannot be reconciled, and thus are contrary to constitutional protections.

In *State v. Robinson*, No.W2001-01299-CCA-R3-DD, 2003 WL 21946735, at *16 (Tenn. Crim. App. Aug. 13,

2003), our Court of Criminal Appeals expressly adopted the rule of the Court of Appeals for the Eighth Circuit in Groose, 205 F.3d at 1052, that such "core" inconsistencies violate Due Process guarantees. But in our review of Robinson, we expressly declined to address the issue, or whether the Court of Criminal Appeals erred in adopting the rule, because we held that the facts of the case did not support a finding that the two prosecutions were inherently inconsistent. *State v. Robinson*, 146 S.W.3d 469, 496 n.13 (Tenn. 2004). Just as in Robinson, we need not, and do not, address the legal issue here because we conclude that the State did not pursue inconsistent prosecutions at Mathews' and the Appellant's respective trials.

First, we think that the Appellant's "lone perpetrator" characterization of Mathews' prosecution is demonstrably false. During opening statements in Mathews' trial, the prosecution specifically referred to the possible "involvement of people other than Courtney B. Mathews and David Housler" and also mentioned that Housler was "charged[,] as is Courtney B. Mathews[,] in a separate indictment with four counts of first-degree murder." The prosecution further stated that, at that time, it was seeking the death penalty against Housler. The State also claimed "the defendant [Mathews] engaged with others at a party at a trailer in Oak Grove, Kentucky, . . . in a discussion of the planning of [a robbery of] his place of employment." During a sidebar on June 16, the prosecutor mentioned "[t]his case is still under investigation as to other people's involvement." The very last witness called by the prosecutor during rebuttal, Judge Charles Bush, testified that Housler had been indicted for first-degree felony murder and that the State was seeking the death penalty against him. In short, the Appellant's" lone perpetrator" characterization of the Mathews trial seems to be based on the fact that the prosecutor primarily presented evidence only of Mathews' guilt. But since this was the sole issue at his trial, this fact is not remarkable.

We recognize that the prosecution based its case against the Appellant here mainly upon his own confession—a confession that admittedly contained numerous falsehoods that contradict evidence presented at Mathews' trial. The chief variation in the evidence is this: At Mathews' trial, the prosecution presented evidence that Mathews left work at Taco Bell on the night of the killings at about 9:15 p.m., returned to his residence at Ryder Avenue in Clarksville shortly thereafter, packed up several weapons and changed his clothes, and then left alone at around 10:30 to 11:00 p.m.—presumably straight for Taco Bell, where the murders occurred sometime after 2:00 a.m. At Mathews' trial, no account was made of Housler's whereabouts on the evening of the murders; furthermore, the prosecutor presented evidence that Mathews' car was parked outside the restaurant at the time of the killings and that Mathews was seen both inside and possibly outside the restaurant after he clocked out but before it was closed. All this, argues the Appellant, gave the impression that Mathews committed the Taco Bell murders alone. At Housler's trial, the prosecution's evidence, based on the Appellant's confession, showed that on the night of the murders Housler met Mathews and several others at a trailer park in Kentucky, that the group left in two or three cars at about 11:00 p.m., and that they arrived shortly thereafter at the Taco Bell, where Mathews and Kevin Tween entered and within twenty minutes committed the murders and robbery while Housler served as a lookout.

We agree with the Court of Criminal Appeals that the State did not present inconsistent, constitutionally-infirm theories in the respective prosecutions of Mathews and Housler. Although we do not today adopt the rule of Groose, the court there stated that "No violate due process, an inconsistency must exist at the core of the prosecutor's cases" and that prosecutors need not "present precisely the same evidence and theories in trials for different defendants." 205 F.3d at 1052. The inconsistencies here did not exist at the core of the

prosecutors' cases; in fact, the core theory of the two prosecutions was consistent—namely, that Mathews shot the victims and robbed the store, while Housler served as a lookout. These two theories obviously are not irreconcilable. How Mathews and Housler arrived at the Taco Bell on the night of the murders is immaterial to their guilt, and like the appeals court, we do not think there is a "reasonable likelihood" of a different result had the prosecutor presented precisely the same factual evidence—particularly in light of the fact that Housler rebutted the prosecution's case in chief against him by presenting the factual account that the State gave at the Mathews trial.

Ultimately, the Appellant here argues that the State violated Due Process by presenting differing accounts of both Mathews' and Housler's arrival at the Taco Bell murders—at least one of these accounts, he argues, was certainly not true. We agree that "prosecutors must not present proof of an historical narrative that they know not to be true[,]" *United States v. Siriprechapong*, 181 F.R.D. 416, 422 (N.D. Cal. 1998) (summarizing *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny), but we also recognize that "prosecutors are not omniscient." *Thompson v. Calderon*, 120 F.3d 1045, 1071(9th Cir. 1997) (Kozinski, J., dissenting). Just as important, prosecutors are not finders of fact.[4] When a prosecutor has conflicting evidence or simply does not know the truth, he "is entitled to retain skepticism about the evidence he presents and trust the jury to make the right judgment." Id; see also *id.* at 1074-75 (Kleinfeld, J., dissenting) ("The jury is supposed to decide the case based on the evidence and the judge's instruction. . . . It is up to the jury, not the prosecutor,

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[4] We further answer, as we stated above, that here the prosecutor's narrative of Housler's involvement in the robbery and murders came in through Housler's own confession, and all that was required for its admission into evidence was that it be given voluntarily.

to decide what happened amidst a lot of lies.") In sum, we think the words of Justice Thomas in his Bradshaw concurrence apply aptly to this case:

> The Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention.

125 S. Ct. at 2410. That is exactly what happened at the Housler trial: the Appellant presented evidence offered at the Mathews trial that contradicted the prosecutors' account of events at his own trial. During his trial, Housler presented evidence to the jury indicating various inconsistencies in the factual accounts. The jury nevertheless chose to convict Housler.

C. RECANTED TESTIMONY OF LARRY UNDERHILL

The Appellant next argues that he is entitled to a new trial on the basis of the recanted testimony of Larry Underhill, a prosecution witness. We find no merit in this argument.

The prosecutor called Underhill for the narrow purpose of eliciting testimony that Housler, while the two were incarcerated in Montgomery County Jail in December 1995, asked about redemption for sin after mentioning that he had "done a terrible thing" by committing the Taco Bell robbery and the murders himself. The prosecutor admitted to the trial judge that he was "not comfortable" with most of what Underhill told him outside of court, but that since other witnesses could corroborate Housler's asking about redemption, he believed that he could present this specific portion of Underhill's testimony to the jury in good faith. After the Appellant's

convictions, Underhill recanted his testimony, saying that a chance encounter he claimed to have had later at the Turney Center Prison with Courtney Mathews, who told him that Housler had nothing to do with the crimes, led him to realize that his recollection of the conversation with Housler was a hallucination. He further claimed that he wrote a letter to the prosecutor explaining his recantation; however, the prose cutor said he never received any such letter. Underhill had a history of drug and alcohol abuse, mental health problems, and a lengthy criminal record—all of which were revealed to the jury on cross-examination at Housler's trial.

A new trial may be granted because of recanted testimony when (1) the trial judge is reasonably well-satisfied that the testimony given by a material witness was false and that the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, was surprised by false testimony, or was unable to know of the falsity until after the trial; and (3) the jury might have reached a different conclusion had the truth been told. *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999).

We hold that the first and third prongs of the Mixon test are not satisfied here. First, although the trial judge made no formal findings about the first prong, he presumably found Underhill's recantation not credible, since a new trial was not ordered. We see no reason to disagree with this conclusion, which was also shared by the appeals court. The Appellant presents no evidence to support Underhill's claim that he talked with Mathews after the Housler trial. Moreover, the letter Underhill claimed to have sent to the prosecutor was not received. Concerning Mixon's third prong, even were we to conclude that Underhill's recantationis credible, we think it highly doubtful that the trial court would have acquitted Housler on this basis because Underhill's testimony had only minor significance and was also corroborated and cumulative. Housler is not entitled to a new trial on the basis of

Underhill's "recantation."

D. USE OF THE "MATHEWS' TIMELINE"

Finally, the Appellant claims that a forty-page timeline, composed by Mathews' defense lawyers from statements made by Mathews and numerous potential witnesses, "proves that David Housler is innocent" because Mathews, who refused to testify at Housler's trial, nowhere mentions Housler's participation in the murders and robbery. The timeline was not introduced as an exhibit at trial but was in the possession of defense counsel.

This argument is entirely without merit. The timeline is hearsay composed of hearsay, and much of its information is inconsistent with evidence produced at trial. It is also not internally consistent. The timeline is also not new evidence. And as the appeals court noted, the jurisdiction of both it and this Court is appellate only; we do not have fact-finding authority. Tenn. Code Ann. § 16-5-108 (1994). Accepting the Appellant's argument would require us to substitute our assessment of the evidence for that of the finder of fact—a task we cannot do. Therefore, we hold that the Appellant is not entitled to any remedy on this ground.

CONCLUSION

We reject the Appellant's claim that the State violated his Due Process rights by using his "false" confession and advancing inconsistent prosecutions against him and his co-defendant. Therefore, we affirm the Appellant's convictions and sentences.

It appearing that the Appellant David G. Housler, Jr., is indigent, the costs of his appeal are taxed to the State of Tennessee, for which execution may issue if necessary.

APPENDIX B – Excerpts, *State v. Mathews*

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

CASE NO. 33791

STATE OF TENNESSEE,

Appellee,

versus

COURTNEY B. MATHEWS,

Appellant.

** TRANSCRIPT OF EVIDENCE **
6/21/96 Volume

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[17] the fact that they made the argument twice, we objected twice, you sustained the objection twice.

THE COURT: Well, what the Rule says is that the limitations on the State are that the State's opening argument shall cover the entire scope of the State's theory and that their closing is limited to the subject matter covered in the opening and the Defendant's intervening argument. This Court does not believe that the State's opening argument ever broached subject matter of criminal responsibility of another. But it believes that the Defense introduced the evidence that gave rise to that. I mean the Defense introduced the evidence that Mr. Housler was involved and cross-examined Judge Bush. The Defense introduce a picture of Mr. Housler, called Mr. Housler as a witness. The Defense introduced the declaration against penal interest for the purpose of convincing the jury that Mr. Housler was involved in the crime. The Defense put on all of the evidence that is in this record of Mr. Housler's

involvement. The State did not put on any evidence that Mr. Housler was involved and so the evidence about Mr. Housler's involvement being done by and through the defendant and the defendant then objecting when that subject matter was broached, if it was, when the State said what it did, it seems to me that the Defense has either elected not to argue it when they could have, knowing full well that the subject matter was before the jury, the Defense having introduced [18] the evidence or if they didn't elect not to argue or if they elected to—strike that. Either the Defense elected not to argue the subject matter or they waived any right to do so by objecting to the State broaching the subject if they did.

MR. GANT: Judge, may I just comment on that and then I will be through?

THE COURT: Sure.

MR. GANT: That certainly couldn't be the case, and it couldn't be the case simply because the evidence that the Defense put in with regard to Housler was with regard to Housler's conduct and Housler's conduct totally. Nothing that we introduced by way of the Housler testimony suggested that Courtney Mathews was involved with Housler. It was Housler. Our theory was Housler did it.

Next, we cannot be said to have waived an argument in this regard and I say that because having been tendered the instructions that the Court intended to give in the case, Counsel had reason to believe and reason to rely upon the fact that those would be the instructions that the jury would get. If we had known that this particular instruction was going to be given and this is not a subject that had not been discussed by Court and Counsel, this responsibility issue before. Had Counsel known, the Defense known that this instruction would be given, we may well [19] argued this to the jury, but not having seen that instructior and not having seen it, being assured it would not be given; that is, assured simply because it wasn't given,

then we had no reason to argue this and what I am saying is, if we had been given this, rest assured, we would have argued it. But that's—I have made my record.

THE COURT: I think the entire record will reflect that the subject matter or theory of the criminal responsibility of another has been broached many times. In fact, I can't tell you when or what date, but the -there have been several discussions about criminal responsibility of another. I just don't see how it is a surprise to the Defense that this would be a part of the Court's instruction? I don't know of any authority to open up argument after a jury has retired?

MR. GANT: Judge, one time in the jurisprudence of this country, there wasn't a Miranda either.

THE COURT: Mr. Gant, I am not prepared to do that.

MR. GANT: We have nothing further on it, Your Honor.

GENERAL GARRETT: Nothing further, Judge.

(WHEREUPON, Court was recessed; Court was again called to order, the bailiff having informed the Court of the jury's

* * * *

APPENDIX C – Excerpts, Cooper Testimony, Exhibit in Support of *Housler* Pre-Trial Motion

IN THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL DISTRICT
MONTGOMERY COUNTY, TENNESSEE
CLARKSVILLE, TENNESSEE

[Filed April 01, 1997]

NO. 36548
JOHN H. GASAWAY, III
CIRCUIT COURT JUDGE, PART III

STATE OF TENNESSEE,

v.

DAVID HOUSLER.

EXHIBITS
IN SUPPORT OF DAVID HOUSLER'S MOTION
TO DISMISS INDICTMENT

Michael E. Terry
Stephanie H. Gore
209 Tenth Avenue, South
Suite 310 - Cummins Station
Nashville, Tennessee 37203
(615) 256-5555

ATTORNEYS FOR DAVID HOUSLER

[64] A 333-8939.
Q 333-8939?
A Yes.
Q And where does she work?
A She has two jobs. She works at Midland Foods and the other one is Mrs. Winner's.
Q Mrs. Winner's?
A Yes.
Q Do you have the phone numbers for either of those?
A No, I don't have those phone numbers.

MR. FIELDS: That will be all the quotations.

THE COURT: Is that all, Ms. Young?

GENERAL YOUNG: I have no further questions, Your Honor.

* * * * * (WITNESS EXCUSED) * * * * *

THE COURT: Call your next witness.

GENERAL BUSH: The State will call Patrick Cooper.

PATRICK COOPER was called as a witness, and being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY GENERAL BUSH:

Q Would you state your name, please, and spell your first and last names?
A My name is Patrick Cooper. PATRICK COOPER.
Q And Mr. Cooper, by whom are you employed?
[65] A The United States Army..
Q How long have you been in the United States Army?
A A year and a half.
Q And where are you assigned?
A. To 9th and 101st Aviation.
Q And where is that located?
A Fort Campbell, Kentucky.

Q How long have you been at Fort Campbell, Kentucky?

A Six months.

Q Now, directing your attention back to Saturday January 29th, did you have occasion to see the defendant at his residence?

A Yes, I did.

Q Is the defendant, Courtney Matthews, present today?

A Yes, he is.

Q Would you identify him, please?

A Sitting right there.

GENERAL BUSH: Your Honor, let the record reflect the witness identified the defendant.

Q How long have you known Courtney Matthews?

A About four months.

Q And how did you come to know him?

A Because the guy that is staying with him, Carl Ward, is his roommate and I met them through my unit.

Q Have you ever been to the defendant's residence

[66] A Yes, I have.

Q Approximately how many times have you been to the defendant's residence?

A I have been there a lot.

Q Now, Saturday, January 29th, did you have an occasion to go over to the defendant's residence?

A Yes, I did.

Q Now, who all lived with the defendant, as far as you know?

A I know Carl, his girlfriend, and Courtney.

Q And did you go to that residence on the 29th, that Saturday?

A Yes, I did.

Q What was your purpose for going to the residence?

A Had a little get together party.

Q Do you know what the purpose of the party was?

A We just had one because Sergeant Benny (phonetic he had just come from Somalia and they wanted to cook for .him over there.

Q Do you recall approximately what time you arrived at the party?

A I got there about 4:30.

Q 4:30 p.m.?

A Yes, sir.

Q Do you recall ever seeing the defendant there at the residence?

A Yes, I seen him.

[67] Q Approximately what time did you see him?

A I'd say he came in about 8:00.

Q Is that 8:00 p.m.?

A 8:00 p.m.

Q Do you recall how he was dressed when he came in?

A He had on a Taco Bell shirt and some black pants.

Q Did you have occasion to talk to him when he came in at 8:00 p.m.?

A Yes, I did.

Q Do you recall what you talked about?

A No, I don't. I asked him—what was up, and he told me—I had just got off work.

Q From Taco Bell?

A Yes.

Q At some point in time later on that afternoon, did you have occasion to go into Mr. Matthew room?

A Yes, I did.

Q Do you remember why you went into his room?

A It was—I went in there to talk to him and he was in the bathroom and Carl was in his room by himself and then I walked in his room and me and Carl was sitting there talking.

Q You and Carl?

A Yes.

Q What is Carl's last name?

A Ward.

[68] Q At the time that you and Carl were sitting in the defendant's bedroom talking, where was the defendant?

A He was in the bathroom.

Q And is that bathroom located in that bedroom or was it somewhere else in the -

A Right next door to his bedroom.

Q So, when you were in the bedroom talking to Carl, did you observe any type of weapons in that room?

A Yes, I seen a 9 millimeter and a shotgun.

Q A 9 millimeter and a shotgun?

A Yes, I did.

Q Where was the 9 millimeter that you saw?

A When I walked in the room, the first time, it: was on the bed and the second time I went in and Carl had it cause once I had went in the room by myself. And there wasn't anyone in there. The second time Carl had the 9 millimeter in his hand.

Q Now, let me back up and ask you this. The firs time you went in the room, did you see the 9 millimeter?

A It was on the bed.

Q Was it in anything?

A No, it wasn't.

Q At that time, the first time you went in his room did you see a shotgun?

A It was - it was laying on the bed also.

Q Describe the shotgun to us when you saw it.

A It was taken apart. It was a black shotgun, and a brown stalk.

[69] Q Now, when you said "taken apart", describe.what you mean.

A The barrel was taken away from the other part.

Q The barrel was loose from the rest of the gun?

A Yes, it was.

Q And was this laying on the bed?

A Yes, it was.

Q And you indicated that you went back in second time?

A That's right, after Carl had went in there,

Q So, you went in the first time and came back out.

A Yes—

Q. —and Carl—

A I went in the first time, I just looked in there, right. And the gun was laying there. The second time. I went in, Carl was in there by himself. Carl was holding the 9.

Q And you went in, Carl was -where was Carl, was he standing, sitting—

A He was sitting on the bed.

Q And Carl had in-in his hand and what?

A The 9 millimeter.

Q And did at some point in time, the defendant Courtney Matthews, come in that room?

A Yes, he did.

Q Did he make any statements to either you or [70] Carl concerning the guns that were there?

A I asked him what he was going to do with them and he told me he was going to sell them.

Q Did he say where he was going to sell them?

A In Nashville.

Q Had you ever seen that shotgun before?

A No, I haven't.

Q Had you ever seen that 9 millimeter before?

A No, I haven't.

Q Did you ever see any other type weapons in there?

A Yes. After—whenever all of us was in there talking he took a .25 out of his back pocket.

Q Now, when you say ".25" what do you mean?

A A small hand piece pistol.

Q A .25 caliber?

A Uh huh (meaning yes by sound).

Q Is that an automatic?

A Yes, it was.

Q And that came from the defendant's—

A Back pocket.

Q Back pocket. When you were in the room, did the defendant in any way change clothes?

A Yes, he did.

Q Would you describe to the Court how he changed clothes?

A Well, whenever—he had on some—some green and orange Miami aurricane pants and a shirt and then over that [71] he put on some black jeans, a white shirt, a black jacket with some black combat boots.

Q Did you ever ask him why he was putting clothe on top of clothes?

A Yes, I did.

Q And what was his response?

A When I asked him, he said—he was going to sell the weapons then he said—the reason he was putting those clothes on top of the other clothes was in case the police came, he could change clothes and then they wouldn't recognize him.

Q Do you know whether or not at the time that you were looking at the guns in there if they were loaded?

A No, whenever- whenever Carl had the 9 millimeter, it was loaded, then I asked him to let me see the gun and I had the gun in my hand and then after I had gave it back to Carl, then Matthews had got it from Carl and he eject a bullet out of it, then he took the clip out and that's when I realized the gun was fully loaded.

Q After he ejected the bullet out and took the clip out of it, what did he do with the gun?

A He had—he had it in his hand, then after he picked the bullet up off the floor, he put the round back in the clip and then loaded the weapon back up.

Q Did he have anything on his hands at the time he was doing this?

A Yes sir, he had some gloves on.

Q What kind of gloves?

[72] A At first he had some plastic gloves like they use at the hospital, whatever, he had those on at first. :The he changed out of those and put some like black -we have some green inserts that we wear with .out military gloves, he used them and he used some black gloves also.

Q Did you ever ask him any questions about why he was using gloves while handling those guns?

A No, I didn't. I guess it was so he wouldn't leave any fingerprints on the weapons.

Q Did he ever indicate to you where he got the gun - the 9 millimeter from?

A No, I asked him—I asked him—whose guns were they, and he said it was his, but they wasn't in his name.

Q Okay. Who said that now?

A Matthews.

Q. Matthews said—

A That they was his guns, but they wasn't in his name.

Q They were not in his name. Now, once you saw this 9 millimeter loaded, bullet in the chamber, and the clip in the gun, was there ever any mention of any other clips that would fit that 9 millimeter?

A He said there was one in the bag.

Q In the bag?

A Uh huh (meaning yes by sound).

Q What type bag are we talking about?

A It was like—the black bag like—like most [73] the people have, like - they have got a flap over the top you can button it up on the bottom kind of - it is like back pack.

Q A back pack?

A It was a leather black bag.

Q Is that something like you see students wearing around town?

A Yes, it is.

Q Was there any other type bag in there that you saw?

A I had seen a bowling ball bag.

Q Did you ever have an occasion to look in the bowling

ball bag?

A No, I didn't.

Q Do you know what was in the bowling ball bag?

A No, I didn't. I just assumed a bowling ball was in it.

Q Now, after he has changed clothes, ands defendant indicated he was going to Nashville, did he ask anybody to come with him?

A No. We—me and Carl—since he told us he was going to sell the weapons, and he said—in case any trouble came, that's why the guns was loaded or whatever, then me and Carl said—why don't you let one of us go with you if you think you are going to run into trouble, and was like—no, he'd go by himself.

Q Did you offer to go with him to Nashville?

A Yes, I did.

[74] Q Did you hear Carl offer to go with him?

A Yes, I did.

Q And he said—no, 116 didn't want you to go?

A That's right.

Q Now, do you recall approximately what time it was that he left the residence?

A I would say about 10:00.

Q Would that have been 10:00 p.m.?

A 10:00 p.m.

Q And when he left the residence, how was he dressed?

A He was dressed in his black combat boots, black jeans, the white shirt with the black tie and the black jacket.

Q Black jacket?

A Oh huh (meaning yes by sound).

Q Describe the black jacket that you are talking about.

A The black jacket was a—like a thin blue jean type jacket with a hood on it, with the sleeves rolled' up.

Q With the sleeves rolled up?

A Uh huh (meaning yes by sound).

Q Do you recall whether or not one sleeve was rolled up or were both sleeves rolled up?

A I'm not—I think both of them was. I know—I seen one of them was when we was in the room. I guess both of them was rolled up.

[75] Q At the time that he left, did he still have the gloves on?

A Uh huh (meaning yes by sound), the black gloves, he had some black gloves on.

Q When he left, did he have those two bags with him?

A Yes, he had the bowling ball bag—no, the bowling ball bag he said was in the car and he had the gun on his back.

Q Did you ever ask him any questions as to why he was taking his bowling ball bag with him if his intent was to go to Nashville to sell guns?

A He said—in case—while he was going up there with the guns, he'd take—in case he'd get pulled over, and the police would ask him what he was going to do he said—he's say he was going bowling.

Q He would tell the police he was going bowling?

A Yes.

Q Do you know what kind of car the defendant drives?

A It is a blue and gray Sunbird.

Q At that time, on this Saturday night, did you know whether or not the defendant was employed at Taco Bell?

A Yes, he had told me he was. And also Carl had told me he was working at Taco Bell, so—

Q When the defendant was changing clothes, loading these guns in his bedroom, did he appear to be nervous to you in any way?

APPENDIX D - Excepts, Agent Puckett Testimony, *Housler* Pre-Trial Motion Hearings

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

[Filed AUG. 27, 2002]

CASE NO. 36548

STATE OF TENNESSEE,

Appellee,

versus

DAVID HOUSLER,

Appellant.

MOTIONS

THE HONORABLE JOHN H. GASAWAY III,
PRESIDING JUDGE
April 21, 1997 Volume

APPEARANCES

FOR THE APPELLEE:	GENERAL GUS RADFORD DISTRICT ATTORNEY GENERAL STATE OF TENNESSEE
FOR THE APPELLANT:	MR. TERRY ATTORNEY AT LAW NASHVILLE, TENNESSEE
	MS. STEPHANIE GORE ATTORNEY AT LAW NASHVILLE, TENNESSE

[179] to prosecute.

THE COURT: I understand and I certainly appreciate the remarks of both counsel and I will say this and then we will move on. I will ask this question. Has there been a motion for a Bill of Particulars—

MR. TERRY: No, Your Honor, but there will be.

THE COURT: The reason I am asking is because if anything begged for a Bill of Particulars in terms of what about this statement can be corroborated, it is this set of facts.

MR. TERRY: We wanted to see what you would do on our last motion and I have one more conversation that I want to have with the Attorney General before I file that motion. We had a conversation after the last one that indicated that we might want to wait and then I am going to talk to him today and decide whether to file it or wait.

THE COURT: I understand. Let's have Mr. Puckett back in.

MR. JEFF PUCKETT was recalled as a witness and after being reminded of his previous oath, was examined and testified as follows:

CROSS EXAMINATION CONTINUED

BY MR. TERRY:

Q Agent Puckett, have you had an opportunity to [180] take a look at part 5 and part 6, the two more extensive statements given on October 20th?

A I am familiar with them.

Q Have you had a chance to look at them recently, today or—

A. I looked over them.

Q Would you agree with me that those statements implicate Sulyn Uglanca in the Taco Bell murder/robbery?

A Yes.

Q Would you agree that those statements implicate Kevin (Red) Tween in the Taco Bell murder/robbery?

A Yes.

Q Has Mr. Tween been charged or indicted for those offenses?

A No.

Q. Would you agree that these statements implicate Melanie Darwish in the Taco Bell murder/robbery?

A Yes.

Q. Has Ms. Darwish been charged or indicted for those crimes?

A No.

Q Has Ms. Uglanca been charged or indicted for those crimes?

A No.

Q Mr. McMillan testified—well, I shouldn't tell [181] you what he testified—were you present when the District Attorney told Mr. McMillan that he believed that Ms. Uglanca was not involved?

A No, I don't think that I was.

Q. Is that your view that she was not involved?

A Yes.

Q. You went to Sunset Beach, North Carolina after October 20th and interviewed Ms. Uglanca at her home there, didn't you?

A That's correct.

Q. At that time, she denied any involvement in the Taco Bell crimes?

A That's correct.

Q And she-contradicted other portions of this statemE saying that she never observed certain people together at certain times, is that correct?

A That's correct.

Q And subsequent to that, I think maybe with the assistance of the North Carolina authorities, you gave her a polygraph examination, is that correct?

A South Carolina, I believe it was.

Q Is that correct?

A That's correct, yes sir.

Q And she passed it, according to the polygraph examiner?

[182] A Yes, sir.

Q Subsequent to that, you then asked for a confrontation with Mr. Housler and you and the District Attorney said that you believed Ms. Uglanca and that she was not involved, is that right?

A That was my opinion.

Q. So any—would you agree with me that any portion of these statements indicating the involvement of Sulyn Uglanca in these crimes is false?

A I do.

Q. And that would have to do with anything that implicates her in the crime; for instance, the color of the shirt that she had on or whether she slapped somebody on the head and said this isn't worth it, any of those little details like that is false, correct?

A As regards to her being associated with the Taco Bell crime, yes.

Q. Right, when they are driving down the street and Sulyn said this is more trouble than it is worth, that's false?

A As far as I am concerned—

Q. When they go to the Minit Mart and Kevin Tween and David Housler borrow money to go in and buy beer and cigarettes, that's false, isn't it? She wasn't there?

A She was not there in my opinion.

[183] Q. They said they borrowed money from her—

A Right.

Q —they used her money, that's false, correct?

A Yes, sir, that's false in my opinion.

Q. Afterwards, after the—it happened, it says that Sulyn was hysterical, she was really mad and that Mr. Housler had

to spend time with her calming her down and she called him a bastard, that's all false, isn't it?

A In my opinion, yes.

Q. There was a portion of this statement where Mr. Housler says that he remembered that Tween and Darwish dropped Mathews off at his barracks after the crime? That's false, isn't it?

A In my opinion, yes.

Q. Isn't it your opinion that Tween and Darwish were not involved in these crimes?

A Not that I can prove.

Q. So in your opinion, the incrimination of Kevin Tween and Melanie Drawish—

GENERAL RADFORD: Your Honor, that—

MR. TERRY: —in the Taco Bell Crimes is false, isn't it?

GENERAL RADFORD: —calls for a conclusion. I am going to object to that.

[184] THE COURT: Sustained.

Q. (By Mr. Terry) Would it be fair to say that you have no evidence to corroborate the involvement of Kevin Tween and Melanie Darwish in the Taco Bell murders?

A That's correct.

Q Mr. Puckett, can you identify that as the warrant upon wish Mr. Housler was arrested for the Grandpa murders?

A THE COURT: I'm sorry, you said Grandpa murders, did you mean to—

MR. TERRY: The Grandpa robbery?

THE WITNESS: That is what it appears to be.

MR. TERRY: I would like to make that the next exhibit for identification?

THE COURT: Motion granted. Received and marked Exhibit number 3.

(WHEREUPON, Exhibit number 3 was marked for identification and received into evidence.)

Q. Mr. Puckett, on what date did the Grandpa ATM robbery take place?

A It states here January 23rd.

Q. Let's look again at—that's January 23, 1994, correct?

A That's right.

Q. These extensive statements here, items 5 and 6 that you took on October 20th, there is a whole bunch [185] of stuff about David Housler bragging about the Grandpa robbery on January 21?

A Yes, sir. In his statements—what specific statements are you speaking of?

Q. Well—look at the first page of item number 5. Talking about Charlie Brown and one of the things apparently that is alleged that went on at these so-called parties is bragging about crimes? You see this a lot in these statements, but in this case, Charlie Brown is talking about a Corvette he had stolen and according: to Housler, he told about a robbery "we had committed at Grandpa's"? Do you see that?

A Yes, sir.

Q. That, supposedly occurred on the Friday—on a Friday night, if you look at the first paragraph—

GENERAL RADFORD: Your Honor, excuse me, I don't know what we are looking at—

THE COURT: Could you be a little more clear please?

MR. TERRY: Okay, look at the first paragraph, "I met Courtney Mathews for the first time at Kevin Tween's trailer in Oak Grove approximately a week prior to the murders at Taco Bell?

A Right.

Q. I remember this being on a Friday night, okay?

[186] A Yes.

Q. Taco Bell happened on a Sunday morning?

A. That's right.

Q. The 30th?

A That's right.

Q. The day before was a Saturday, the 29th?

A That's right.

Q. The day before that was the 28th of January and that was a Friday?

A Yes, sir.

Q Now, it either had to be that Friday or the 21st, the week before? Do you understand?

A Yes, sir.

Q. It couldn't have been that Friday, could it? It wasn't the Friday, the day before, because Courtney Mathews was at work that day, wasn't he?

A I'm not familiar with his schedule for that day.

Q. Did you understand that to be the two days before the crime or a week before the crime, a week prior to the murders?

A I took it to be a week prior to the murders.

Q. Okay, so that would have been that it was—the latest that it could have been would have been Janauary 21?

A. That would be right.

Q. And this statement says that David Housler is [187] bragging about a crime that he is going to commit two days later? Isn't that correct?

A Right.

GENERAL RADFORD: I beg your pardon. I don't see what he is talking about?

THE COURT: Go through your examination again and try to be clear—

MR. TERRY: In the first paragraph, it says that Mathews and Housler meet at the trailer in Oak Grove, Kentucky approximately a week prior to the murders at Taco Bell on a Friday night, okay?

THE COURT: Now, form in a question.

GENERAL RADFORD: I have that part, if it please the Court.

MR. TERRY: Do you understand that Friday -I think we agreed that Taco Bell occurred on a Sunday morning, the 30th?

A That's correct.

Q The day before is Satuday, the 29th?

A Right.

Q The day before that is Friday, the 28th?

A Right.

Q You did not understand that to be the day that he was referring to?

A That's not what he explained to me, no.

[188] Q Okay, you understood it then to be Friday, the 21st?

A That's what he said it appeared—that's what he remembered it being, yes.

Q So this is a statement from a man who is saying that—he's bragging about a crime at a time he hadn't committed it, right?

A If he was correct.

Q On the second page, partially through the first paragraph, in a few minutes, Melanie Darwish, who is Tween's girlfriend, came over to me and said she was in and Bonnie and Clyde ride again? Darwish was referring to me and her because she helped me on the Grandpa's robbery? Again, he's talking about something at a time that he had not done it, correct?

A If he was correct.

Q Well, did you investigate that aspect of this confession?

A Which aspect is that?

Q The fact that it is internally impossible—it's impossible to be bragging about a crime on the 21st, when he never

committed the crime until the 23rd? Did you spend any time focused on that?

A No, I did not.

Q You know on the night that Courtney Mathews killed these people at Taco Bell, he was working there that [189] day, wasn't he?

A Earlier in the day, I think that's correct.

Q Do you know what time he got off?

A Around 9:30 p.m.

Q And he went home—he went to his house on Ryder Avenue, didn't he?

A That's right.

Q That's what the evidence—not only did his two roommates, Carl Ward and that other fellow—Cooper—

A There were several people at the house.

Q Cooper—Cooper and Ward, two people who testified in the Mathews trial said that on the night of the murders, Mathews came walking in in a Taco Bell uniform into the house that they shared about 9:30 or so, isn't that correct: Didn't your evidence reveal that?

A That's correct.

Q And an hour later, the phone records indicate that Mathews was talking to his father in New York at 10:30 that night, about 10:30 that night? Do you remember that?

A Yes, sir.

Q Remember the long distance phone records? I think you discovered them, you found them, isn't that right?

A Yes.

[190] Q So Mathews was at Ryder Avenue from 9:30 until at least 11:00 on the night that he killed these people down on Riverside Drive, isn't that correct?

A Around about that time.

Q And this whole statement that Housler gave, indicat that he and Mathews were out in some trailer in Oak Grove Kentucky at the same time, isn't that correct?

A If he was correct.

Q Well, how far is it from Ryder Drive to Oak Grove, Kentucky?

A Fifteen minutes, ten or fifteen minutes.

Q Did you do anything to focus on or investigate whether or not Mathews was at Ryder Drive or whether he was out there at Oak Grove, Kentucky, at this time? After he got off work?

A Well, obviously there was a conflict.

Q Obviously. One thing I think you did, is you checked it out with Tween, who said that Mathews wasn't there? Isn't that right—

GENERAL RADFORD: Objection. Now, we're getting into hearsay.

THE COURT: Well, sustained as to the form of the question. You can ask specifically about the conversation with Mr. Tween.

MR. TERRY: In trying to determine whether [191] Mathews was in Oak Grove or Ryder Drive, like Ward and Cooper testified to? Ward and Cooper testified that he came in and he got guns and bags and changed his uniform the records show that he talked to his father, he was there at least until 10:30 or 11 o'clock and left. Now, this statement of Housler's says that Mathews is sitting out there in a trailer at Oak Grove, talking to Tween, Uglanca, Corley, Housler and all these people about the crime that they are all going to commit that night, isn't that correct?

A Is what correct?

Q Well, isn't it correct that Cooper and Ward said that Mathews was at one place and Housler in this statement puts Mathews at some other place with Housler?

A There was a conflict of time if all the times are correct, right.

Q Now, did you in trying to determine—well, let me ask you this, did the State in the Mathews trial offer the Ward and Cooper version in this courtroom as evidence against Courtney Mathews?

A Ward and Cooper testified, yes.

Q And that was their version, right? That he was on Ryder Avenue with them?

A I wasn't in the courtroom when they testified.

Q Well, I have that transcript. Do you know if [192] the State used those phone records that showed that Mathews was over there talking to his father as late as 10:30 that night?

A I am not sure that they did or not.

Q Did you go talk to Sulyn and ask her if he was out there in that trailer with Mathews and Corley and Housler and her brother, Dana, on the night that Mathews killed these people?

A Yes, we did.

Q Did she deny that?

A Yes, she did.

Q She denied that Mathews was even there, didn't she?

A She stated that she wasn't there the entire night, I believe is what her story was.

Q There were parties going on at both places, weren't there?

A At both places, which places are you speaking of?

Q Ward's house and Tween's trailer?

A Yes, I believe that's correct.

Q Did you talk to Melanie Darwish and ask her whether Mathews was at out at the Oak Grove trailer on the night that he killed these people?

A I did not personally speak with Melanie Darwish [193] about it, but other agents did.

Q What was her testimony?

A I don't know what her testimony would be, but I—

GENERAL RADFORD: Your Honor, I am going to object and even if she said it, it's attempting to prove a fact and

therefore, it is hearsay admitted to prove the fact, which is inadmissible.

THE COURT: Sustained.

Q (By Mr. Terry) Part of this statement—and let's leave that alone—I want to cover a few more things if I can. There is a portion of these two statements that talks about Hippie Dude?

A Correct.

Q Housler gives a statement and one of the things that he is going to do is go get ammunition from Hippie Dude, are you familiar with that?

A Yes, that's correct.

Q Did you or the people who were working with you, attempt to locate Hippie Dude?

A Yes we did.

Q And you had an address and a location?

A Yes.

Q And when you went there, the man who was living there had moved to Michigan?

[194] A That's correct.

Q And you contacted him in Michigan?

A Yes, sir.

Q And he gave you a statement, didn't he?

A He gave one of our agents a statement, that's correct?

Q And he said I don't know Housler, and he never came over and got any ammunition, I don't know what he's talking about?

A That's right.

Q Agent Puckett, as part of your investigation, did you interview a man by the name of Hector Ortez?

A Yes, we did.

Q Did he Mr. Ortez tell you that on the Saturday night of the Taco Bell homicides, he was at the Oak Grove Trailer?

A I believe that he did.

Q Did he tell you that Kendra Corley and Courtney Mathews were not there?

A I would have to review the statement, but I recall that he didn't—

MR. TERRY: Your Honor, if I could have the witness look at this—

(COURT OFFICER COMPLIES WITH REQUEST.)

MR. TERRY: I would like for you to look [195] at page 2—

(WITNESS COMPLIES WITH REQUEST.)

THE WITNESS: That's correct.

Q He told you that Mathews was not at the Oak Grover trailer and Kendra Corley was not at the Oak Grove trailer on the Saturday night before the Taco Bell murders, right?

A That's correct.

Q And that's major conflict with these two statements?

A That's right.

Q Now, your investigation—I don't think we need to make this an exhibit at this point. It just refreshes his memory.

Your investigation had already indicated to you, Agent Puckett, that Kendra Corley wasn't there, isn't that correct because you knew she was at work?

A She was supposed to be at work that night, that's correct.

Q Well, you found the man by the name of Shane Box who had made a date with Kendra Corley the night before and had gone into where Kendra was employed and talked to her and went back the night before and she was there at work and he was to take her out after work, and he did, isn't that correct?

A That's right.

Q And the night that Courtney Mathews was down [196] on Riverside Drive killing these people, Kendra Corley was at G's Pancake House with—on a date with Shane Box, isn't that correct?

A Around about that time, yes.

Q She was there until 3 o'clock in the morning, wasn't she?

A I don't remember the specific time, but she was at G's Pancake House that night—

Q And she had worked until 1 o'clock that morning at some place called the Night Deposit?

A That's correct.

Q She had worked there until 1 o'clock in the morning, right?

A One or two, something like that.

Q Do you know what time she went to work?

A Sometime in the late afternoon, five o'clock or so.

Q Worked there until 1 o'clock in the morning, went out with Shane Box, a person who had no other connectic with thhse people, had a good record, wasn't a trouble maker or anything, is that right? Until 3 o'clock in the morning?

THE COURT: In the first place, Mr. Terry, you're asking compoundsquestions that would call for about five, six, seven responses and Mr. Puckett at times just nodding his head, doesn't give a response. This [197] record is not going to be very clear. Now tedious as it may be, please avoid the urge to string a bunch of things together and say is that not right and get a specifi response as to each of the facts please.

Q (By Mr. Terry) Agent Puckett, did your investigati indicate that Kendra Corley went to work late in the afternoon of the Saturday before the Taco Bell murder?

A Yes, it did.

Q Where did she work?

A Night Deposit on College Street.

Q When did she get off?

A Between 1:00 and 2:00 a.m., I believe.

Q After she got off, what did she do?

A She went to G's Pancake House with Shane Box and ate breakfast.

Q And so any indication that Kendra Corley was at the Oak Grove trailer as indicated in the Housler statement, is false, isn't that correct?

A The only indication that I had that she was anywhere other than work was that she could have been missing for fifteen to twenty minutes at a time without anyone knowing where she might be?

Q Missing from work? Do you have any—

THE COURT: Your answer please? He said missing from work and you didn't answer?

[198] THE WITNESS: She could have taken a break for fifteen to twenty minutes or went out to smoke and would not have been at work for those periods of time or would not have been noticed at work for those periods of time.

Q (By Mr. Terry) But other than that, she was at work?

A That's right.

Q Could she have gotten to the Oak Grover trailer and back in that fifteen minutes?

A Not in that fifteen minutes.

Q So again, any indication that she was at the Oak Grove trailer or with any of these -- with Mathews or with Housler, or any place except this Night Deposit or G's Pancake is false, isn't that correct?

A With the exception of her possibly being missing from work for fifteen to a twenty minute period of time.

Q I don't know if I asked you this. Kendra Corley hasn't been charged or indicted?

A No, sir, she has not.

Q I think that earlier you indicated that some of the information that you had received about Mr. Housler was

received from a man by the name of Mike Paleno? Is that correct?

A That's correct.

[199] Q. Do you remember taking a statement from Mr. Paleno on December 12th, wherein he indicated to you that—

GENERAL RADFORD: I object to any relevance of any other statement of Mr. Paleno or information concerning Housler. That's not what we are trying to—

THE COURT: As I said earlier, the scope of these proceedings is quite broad at this point. Clearly what Mr. Terry is engaging to do is to show that the State knows or has reason to believe that portions of the statements by Mr. Housler are if not true, at least uncorroborated or incapable of being corroborated. I will permit you to go ahead with your line of questioning, Mr. Terry, that you wish to develop, but we will talk about this tomorrow as I indicated. Go ahead.

Q (By Mr. Terry) With regard to Mr: Paleno, do you recall taking a statement from Mr. Paleno on or about December 12th, 1995?

A Yes, sir, that would be about the correct date.

Q Do you recall Mr. Paleno telling you that any information that he had given you about overhearing the planning between Mathews and Housler was something that somebody else had told him?

A Yes.

Q And that information that he gave you contradicted what he had told you before?

[200] A Yes, that's correct.

Q So basically, Paleno was telling you that he didn't have any independent recollection. He was just correcting what he had told you before?

A That's correct.

Q Mr. Puckett, much of what we have just covered here about contradictions with the—between the evidence and the

Housler statement was developed after Mr. Housler was indicted, isn't that correct?

A Some of it, yes.

Q Well—he was indicted on November 7th?

A Yes.

Q At that time, you hadn't talked to Hippie Dude or (inaudible) I think his name is? Had you?

A I don't recall what date that Hassett (phonetic) was talked to.

Q If the statement indicates November 10th, would that be—

A That would be correct.

Q You had already talked to Sulyn?

A Right.

Q You went there and talked to her?

A Yes, sir.

Q. And subsequently, you learned the information about Kendra Corley and Shane Box, isn't that true?

[201] A I am not certain when I learned the information about Kendra Corley and Shane Box.

Q If the statement from Shane Box indicates 11/9, two days after the indictment, would that be correct?

A May I see that?

Q Yes.

(WHEREUPON, the above-mentioned document was presented to witness.)

A That would be correct.

Q Is it fair to say that on November 7th, the day. that you indicted or you participated in the indictment of Mr. Housler, that Melanie Darwish and Kevin Tween were brought to the courthouse?

A I recall that.

Q And did you interview them?

A No, I did not.

Q Do you know if any investigator did?

A Yes, they were interviewed.

Q Without getting into the details of that interview, neither one of them have been accused of any participation in this crime, is that correct?

A They've not been charged.

Q And you don't have any evidence that indicates that they were involved, do you?

A Nothing that I can corroborate, correct.

[202] Q. And then subsequent to that, I think you have indicated that in December—on December 20th, you interviewed Mr. Ortez and learned that information?

A That would be correct.

Q Now, this information that you learned about Uglanca, Tween, Darwish -- from Ortez, about where Corley was, the interview with Mr. Box, have you communicated all this information to the District Attorney General?

A Yes.

Q Mr. Puckett, could I ask you to turn in Exhibit 1 to part 4—

(WITNESS COMPLIES WITH REQUEST.)

A Yes.

Q This is what I am referring to, it's the first October 20th statement.

A Okay.

Q This document indicates that it was reported on 10/30, yet the first paragraph says on October 20th? Can you explain that?

A That would have been the date that I dictated it to the case file.

Q What, the reporting date?

A Right.

Q During those ten days, how did this exist?

A On my notes and my memory.

[203] Q. On the second page of this statement, you indicate that Mr. Housler made some kind of statement to you out of the presence of his attorney?

A Yes.

Q What were the circumstances—would allow you to interview him out of the presence of his attorney that day?

A His attorney and the District Attorney were talking or he took a bathroom break and I just felt like Mr. Housler wasn't telling me the entire truth and I asked him if he was telling me the entire truth?

Q So while his attorney was talking to the D.A., you questioned Mr. Housler?

A I told him it would be in his best interests if he would tell me the truth.

Q Did you tell him anything else?

A I don't recall that.

Q At that point in time, on October 20th, is it fair to say that Mr. Housler was still sticking to the story about he and Mathews at the trailer party and Mathew: telling him what he was going to do? Was that still his story at that point?

A Yes.

Q And this occurred, this conversation between you and Housler outside the presence of his attorney,[204] this occurs after the proffer is written, is that true?

A I don't know that.

Q Would you take a glance at part 8—

GENERAL RADFORD: Your Honor, we will stipulate that the proffer is written on the 19th and this was on the 20th.

THE COURT: I know, but I think his purpose is to go beyond establishing that fact. Overruled, go ahead.

Q (By Mr. Terry) Do you know at that point, whether or not on the 20th, after the proffer was done on the 19th, Mr. McMillan had given you any previews of other testimony that

you might expect, like giving people rides or anything like that?

A You'll have to explain yourself? Giving people rides?

Q Well, at this point, it appears from your account of this that a proffer, some agreement had already been struck and signed on the 19th?

A Yes, uh-huh (indicating yes by sound).

Q And on the 20th, Housler is still basically doing the Mathews and I at the party talking about Taco Bell routine, okay?

A Yes.

Q Then after that, you and he have a little private [205] conversation when his lawyer is gone and he starts telling more, is that how it happened?

A I just expressed an interest and told David Housler that I felt like that in light of what was going on, it would be in his best interest to tell the truth and I felt like he was holding something back?

Q Okay, and how did that lead to the two big "I did it with everybody else" statements?

A How did what relate to it?

Q I mean, at this point, the lawyer is out of the room. Housler is still telling the same story, you have got the deal struck and you tell him you don't believe him and the next thing you know, we have these two nine-page statements where he is up there with four other people? What happened in between, I guess, is what I am asking?

A His attorney came back in and we continued the process of talking to David Housler.

Q And then what happened? What led him to changing from this trailer meeting with Mathews to this more involved roll that is contained in the nine-page statement?

A He was just told that it was in his best interest to tell the truth.

Q Well, how long did you tell him that?

A We were in there for several hours.

[206] A What else was said to him?

A I don't recall specifically other than we felt like that he wasn't telling us the truth and the only thing we wanted was the truth.

Q How would you indicate to him that you would have reason not to believe him?

A I remember once incident where he said that a weapon was a certain place and when we confronted him with the fact if that weapon is there, we'll find it and if it is not, you know, explain why it wouldn't be there, and at that point, he told us another story about a weapon being—that that wasn't true.

Q Was this like throwing it in the river, but then I didn't throw it in the river and --

A Right.

Q —I left it over at Jennifer's house, that type of stuff?

A That's correct.

Q That went on for hours?

A Well, that and other things.

Q Was the Miller statement mentioned at that time?

A I don't recall.

Q Was the death penalty mentioned?

A I don't recall.

Q Could it have been?

[207] A Could have been.

Q So that meeting could have included a description of the consequences for a first degree murder conviction? That could have been.

A Could you have discussed Courtney Mathews' predicament and what he was facing? What could happen to Courtney Mathews, that type of thing?

A Certainly could have been.

Q You don't want to find yourself in the same position as Mathews, that type of thing?

A Sure.

Q Was the District Attorney in that meeting?

A In and out, yes sir.

Q Who else was in that meeting?

A Different times, Alan Charvis, he was there constanty with me. District Attorney—Assistant District Attorney General Garrett, Assistant District Attorney General Bush was in and out. Of course, Mr. Housler's attorney, Larry McMillan and General Carney.

Q Were pictures shown to Mr. Housler?

A I don't recall that there were? Probably were?

Q Pictures of the victims?

A Right.

Q Anything else like that, any other evidence of the crime shown to him?

[208] A Not that I recall.

Q What would be the purpose of showing the pictures of the victim?

A For him to realize the seriousness of the crime.

Q So that was an effort by the State to impress upon him the seriousness of four murders—

GENERAL RADFORD: Object to these questions because it has not been established that any pictures were shown, only could have been? He's now asking as if they were.

THE COURT: Sustained.

Q (By Mr. Terry) Do you remember whether then Assistant Attorney General Bush was in the room?

A I don't recall that.

Q Do you recall the circumstances that lead to how Mr. Housler articulated a change in his position from I talked to Mathews and that's all I know, to I drove up there with these other four people and was a lookout?

A It's been my experience that it takes a while for people to come around to admit their part in a murder.

Q Do you know how long you were there on the 20th?

A Not specifically, several hours.

Q When Mr. Housler implicated his involvement, was Mr. McMillan there?

A Yes.

[209] Q When Mr. McMillan came back in the room, did you tell him that Housler had said that it was he who put the idea in Mathews' mind to leave no witnesses?

A I'm certain I told everyone in the room.

Q When they came back in?

A Right.

Q Was that the first time that Housler had implicated himself beyond just meeting with Mathews?

AI don't recall the specifics.

Q Do you ever recall McMillan taking Housler out of the room to confer with him?

A Yes, I do.

Q What is your recollection of that?

A He took him out of the room to confer with him.

Q More than once?

A I would say so.

Q Do you recall what time you left there that evening or day?

A It was sometime 7 or 8 o'clock that evening, I would say.

Q Okay, and on the day of the 19th, do you know how long you were there on the 19th?

A I don't really recall.

Q Could you have been there until 9 or 10 o'clock that night?

[210] A Could have been.

Q Do you think you were there until 7:00 or 8:00 on the 20th?

A I think probably at least that late.

Q What time did Mr. McMillan leave?

A Probably an hour or so before we did. Just long enough for us to write the statement out and for him to make sure that that was a correct statement.

Q I may have asked you this, is there any recording of the nine-page statement?

A there is not, other than what was adapted into handwriting.

Q Whose handwriting?

A My handwriting.

MR. TERRY: Your Honor, that concludes my questioning. I would like to preserve the possibility of calling this man back?

THE COURT: Very well. Redirect?

GENERAL RADFORD: No, Your Honor.

** WITNESS EXCUSED **

THE COURT: We will adjourn for the day and reconvene in the morning at 9 o'clock.

(WHEREUPON, Court was adjourned.)

APPENDIX E - Excerpts, ADA Bush Testimony, *Housler* Pre-Trial Motion Hearing

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

CASE NO. 36548

STATE OF TENNESSEE,

Appellee,

versus

DAVID HOUSLER,

Appellant.

MOTIONS

THE HONORABLE JOHN H. GASAWAY III,
PRESIDING JUDGE

April 22, 1997 Volume

APPEARANCES

FOR THE APPELLEE: GENERAL GUS RADFORD
DISTRICT ATTORNEY GENERAL
STATE OF TENNESSEE

FOR THE APPELLANT: MR. TERRY
ATTORNEY AT LAW
NASHVILLE, TENNESSEE
MS. STEPHANIE GORE
ATTORNEY AT LAW
NASHVILLE, TENNESSEE

* * * *

[103] THE COURT: Please state and spell your name for the record?

THE WITNESS: Charles E. Bush, C H A R L E S B U S H.

DIRECT EXAMINATION

BY MR. TERRY:

Q Judge Bush, your date of birth, please?
A January 12th, 1950.
Q Where did you graduate from high school?
A Montgomery Central.
Q What year was that?
A 1968.
Q Where did you get your undergraduate degree?
A Austin Peay State University.
Q What year?
A 1972.
Q And your law degree?
A Indiana University School of Law, Bloomington, Indiana
Q What year was that?
A 1982.
Q When did you pass the bar?
A In 1983, in Tennessee and in 1982 in Indiana
Q Where was your first job as a lawyer?
A With the Monroe County District Attorney's Office [104] in Bloomington, Indiana
Q Were you an Assistant D.A there?
A Yes.
Q How long were you there?
A About two years.
Q Where was your next job?
A With Legal Services of Middle Tennessee in Gallatin, Tennessee.
Q How long were you there?
A About eight months.
Q Next job?

A The Tennessee State Attorney General's Office, Criminal Appellate Division.

Q I had that job once. When were you there?

A From 1984 until 1989.

Q What was your next job?

A The District Attorney's. Office here in Clarksville, Tennessee?

Q When did you start?

A April, 1989.

Q When did you start at the State Attorney General's Office?

A 1984.

Q How long were you an assistant D.A for Montgomery County?

[105] A From 1989 until November 1995.

Q Did you run for election at that time?

A No, I was appointed by the County Commission, the new Judge in November of 1995.

Q And currently, you are—

A I am the General Sessions Juvenile Court Judge in Division III for Montgomery County, Tennessee.

Q Did you try any felony cases in Indiana?

A Yes.

Q You did?

A Yes.

Q You didn't at Legal Services and you didn't at the Attorney General's Office, is that a fact?

A Not in Legal Services, but I did criminal appeals.

Q And then you came here in 1989 as an Assistant D.A?

A Yes.

Q What basically were your duties?

A Prosecute criminal cases from misdemeanors to felonies.

Q Were you—did you have any involvement in the prosecution of the Taco Bell murders?

A Yes, I did.

Q Would you recount your involvement in—

A Well, prior to becoming Judge, I was co-counsel [106] with Steve Garrett, assigned to prosecute the case.

Q You were co-counsel before the case went to trial and then you became a Judge and you weren't involved any longer?

A That's correct.

Q Who else was assigned to the case?

A Just the two of us.

Q In that capacity, did you participate in any statements or interviews from the defendant, David Housler?

A Yes, I did.

Q Which one—what was the first one?

A I really can't recall the specifics, but I believe I was present each time that he was interviewed.

Q When do you recall those interviews being?

A I can't recall specifics.

Q Do you recall any interviews in March of 1994?

A No, I don't.

Q Do you recall having any participation in the reduction of bond that Mr. Housler was able to obtain on the armed robbery charges?

A I don't think I was involved with that.

Q Did you have—do you have any recollection of any conversations with Lawrence McMillan referencing the Grandpa's charges in the reduction of bond?

A None that I can recall.

[107] Q Would it be your recollection that that was handled by Garrett or someone else—

A I believe General Garrett was involved in that.

Q So without looking at anything, you don't have any independent recollection of any contact with David Housler until October of '95, is that correct?

A If I came in contact with him in October of '95? I'm not sure, but I don't think I had any contact with him concerning the armed robbery.

Q Do you recall being present or having any participation in meetings in October of 1995 that led to eventually to statements rendered by Mr. Housler?

A I was present when he gave several statements, yes.

Q What recollection do you have? What independent recollection do you have at this point without seeing any statements?

A Really none.

Q Do you recall where it occurred?

A Everytime that I saw him it was in the DA's office in the conference room.

Q Who else was there?

A General Carney, General Garrett, Jeff Puckett, Alan Charvis, and if I am not mistaken, I could be Helen Young may have been present, but I am not sure.

[108] Q Do you recall any pictures being shown to Mr. Housler at any of the meetings?

A Yes, some photographs of the deceased were shown to him.

Q Who showed those pictures to Mr. Housler? I believe I did.

Q Where did you obtain those pictures?

A I am not sure where those pictures came from. They were crime scene photos. The T.B.I. may have taken those photos or the Clarksville Police Department may have taken them, I'm not sure.

Q Did these photographs show the deceased after they were murdered?

A Yes.

Q How many photographs were there?

A. I can recall four, one for each victim.

Q Do you recall in which of these meetings or interviews that those photographs were shown?

A I believe it was the last meeting, but I am not sure.

Q Do you have any recollection or participation in the formulation of a proffer agreement that was eventually signed by the State and Mr. Housler and his representative?

A I was present when that agreement was produced. I think General Garrett is the one who came up with it [109] and I believe I signed off or it, I'm not sure.

Q Without looking at the agreement, do you have any independent recollection of that agreement?

A I recall the State agreeing not to seek murder charges against the defendant? If I am not mistaken, I believe we had agreed to charge him with conspiracy to commit first-degree murder and there was something else in return for his truthful testimony.

Q Do you recall any communication with the United States Attorney's Office in gathering information that would be appropriate to put into the proffer agreement?

A I think the agreement that we used, came from the United States Attorney's Office and we just modified it to fit our fact situation.

Q Wouldn't you agree, does your memory—is your memory consistent with that proffer negotiation or draft being near the end of the meetings or interviews?

A Yes.

Q So were the pictures shown to Mr. Housler about the time that the proffer agreement was negotiated?

A It was close to that. It may have been in the same meeting.

Q Did you have any discussions with anyone before you showed Mr. Housler those pictures?

A I don't think so.

[110] Q Was that your idea?

A I believe it was.

Q What was the purpose of doing that?

A To show him the seriousness of the crime.

Q The seriousness of the murder of four people?

A Yes.

Q. Was there any other purpose?

A None that I can recall.

Q In any of these meetings, was the discussion—was there any discussion in your presence about the potential punishment for murdering, first degree murder in Tennessee?

A I can't recall if there was. I am sure that in our negotiations with respect to conspiracy to commit first-degree murder, I'm sure that the punishment for first-degree murder would have been involved in that.

Q Was there any description of the punishment to Mr. Housler in your presence?

A Not that I can recall.

Q Was there any discussion of Courtney Mathews' predicament, the fact that he was facing death by electrocution in Mr. Housler's presence?

A If there was, I don't recall it.

Q Well, let me ask you then, other than showing the pictures and the negotiation of the proffer, what you do recall from those meetings in October of '95?

[111] A I recall that we had several interviews with Mr. Housler and in just about each interview, his story would change. During most of the interviews, he would give additional facts that he had not given in prior interviews and it continued along that line until he was arrested.

Q Until he was arrested?

A Yes.

Q Which was on the day that he was indicted?

A That, I don't know.

Q So do you have any specific recollection of the—of negotiation or conversation directly between you and Mr. McMillan?

A No, I don't. I know that the way those interviews were conducted, Mr. McMillan would take Mr. Housler off to the side and they would discuss things and then he would come back and there would be some discussion between the DA's and Mr. McMillan and then we would go and interview Mr.

Housler and it went back and forth like that throughout all the interviews that I can recall.

Q When the DA's were interviewing Mr. Housler, were all the DA's asking questions? Not at the same time, but were questions asked by—

A Yes, just about everybody. I think Puckett and Charvis were also asking questions.

[112] Q Were you present when there was any actual statement. being given by the defendant? And again, this is in October?

A Yes.

Q Was that a question and answer session also?

A Basically, yes. Mr. Housler would start off with a statement and I don't think anybody would interrupt him but then occasionally, he would be interrupted and asked to clarify certain points of his statement.

Q Are you aware of any recording of any of this?

A I don't know whether Charvis or Puckett recorded it or not. I know that as an assistant D.A, I always wanted them to record interviews, but the interviews we had with Mr. Housler were so lengthy, I don't believe they were recorded, but I'm not sure.

Q Did you record?

A No.

Q Do you have any independent recollection of any recording of any of these interviews?

A I don't recall ever seeing a tape recorder, but that is not to say that one could not have been used? I just don't recollect.

Q Did you take any notes from these interviews? Yes, I did.

Q Where are they?

[113] A They're still with the DA's Office as far as I know.

Q The proffer agreement that was negotiated in October was—didn't work out, did it?

A No, it didn't.

Q Why not to the best of your knowledge?

A To the best of my recollection, that agreement was based upon Mr. Housler telling the truth and not implicating any innocent individuals. And as I said before, Mr. Housler changed his story so many times that we—I came to a point where I didn't know whether what the truth was? He just—at one point he said that he was there. Then he came back and said he wasn't there, he had made it all up. There was I think, an attempt on his part to incriminate three other individuals, if I am not mistaken and he attempted to place Sue Uglanca, I believe, at the scene of the crime, when we had no evidence to establish that she was there or the other individuals that he named there, and I can't think of what those peoples' names are.

Q Were you present in any meeting where a determination was made by the State that the proffer agreement had been breached?

A Yes, I was.

Q Specifically, to the extent that you can remember, [114] who else was present in that meeting?

A I would be guessing to tell you. I know that most of the time, General Garrett, myself, General Carney, Jeff Puckett, and Alan Charvis were there or somewhere around there, in close proximity to where Mr. Housler was.

Q Specifically, to the extent that you can remember what—what was the breach or breaches at that time?

A As best that I can recall it was that his story kept changing and that he attempted to implicate those individuals who we had no evidence to suggest that they participated in the commission of a crime.

Q And the other individuals were Tween, Darwish, and Uglanca, is that right?

A I can remember Uglanca Tween and Darwish sound very familiar, but I couldn't swear to that.

MR. TERRY: Thank you for answering my questions.

THE COURT: Questions, Mr. Radford?

GENERAL RADFORD: No, sir.

** WITNESS EXCUSED **

THE COURT: Mr. Terry?

MR. TERRY: General Garrett, please? Also, we had Detective Charvis subpoenaed and I asked and they said they hadn't seen him in the last day or two and I remember last week he was sick or not here?

APPENDIX F - Excerpts, D.A. Carney Testimony, *Housler* Pre-Trial Motion Hearing

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

Case No. 36548

STATE OF TENNESSEE,

Appellee,

versus

DAVID HOUSLER,

Appellant.

MOTIONS

THE HONORABLE JOHN H. GASAWAY III,
PRESIDING JUDGE
April 22, 1997 Volume

APPEARANCES

FOR THE APPELLEE:	GENERAL GUS RADFORD DISTRICT ATTORNEY GENERAL STATE OF TENNESSEE
FOR THE APPELLANT:	MR. TERRY ATTORNEY AT LAW NASHVILLE, TENNESSEE
	MS. STEPHANIE GORE ATTORNEY AT LAW NASHVILLE, TENNESSEE

[40] Q Did his attorney at that time, did he take exception to that?

A No. I do remember that he and his attorney had a private—another confidential, private conversation and then at one point, he came out and said that Mr. Housler admitted that she was, in fact, not down there, and that was the last straw.

GENERAL RADFORD: That's all.

CROSS EXAMINATION

BY MR. TERRY:

Q Mr. Carney, how old are you?
A I am forty-six.
Q Where did you go to high school?
A Clarksville High School, here in Clarksville.
Q What year did you graduate?
A 1968.
Q Did you go to college?
A Yes.
Q Where did you go to college?
A Vanderbilt University.
Q What year did you graduate?
A 1972.
Q After college, how were you employed?
A After I finished college, that summer I worked down at Orgain's Building Supply Company, hauling sheetrock [41] for a summer. I went to school at Austin Peay State University that Fall. I was awaiting on getting an appoint with the Tennessee Bureau of Investigation, which I did. I went to work for them January 2nd, 1973, and was employed with them until I think it was around October 1992.
Q So when you left T.B.I., you were the director?
A Yes.
Q What did you study at Austin Peay?

A I was going to look into going into teaching, maybe coaching?

Q Were you stationed in this county during part of your tenure with the T.B.I.?

A I started out in Cheatham County, I worked Cheatham Dickson, Houston, Humphreys, Stewart counties. I lived in Ashland City until my wife finished college. We married and then we moved back here.

Q For the sake of the record, in case it ever goes anyplace outside of Tennessee. Those counties that you mentioned are all adjoining counties, close counties?

A Yes, that's right, here in Middle Tennessee.

Q So you have worked and lived in Middle Tennessee your entire life?

A Yes, sir.

Q When were you elected as District Attorney?

A I was appointed by Governor McWherter to fill [42] the unexpired term of District Attorney Pat McCutchen, and that was in September of 1993. The following year was the next General Election which was in August of 1994. I ran unopposed and was elected.

Q Where did you go to law school?

A The Nashville School of Law, which at that time was the YMCA

Q What years were you involved in the Nashville School Law? When were you going there?

A Well, I can't remember, it took me seven years to get my law degree because I was going at night and I was working during the day.

Q Were you going to the Nashville School of Law while you were director of the T.B.I.?

A No.

Q Did you go—

A I was finished. I had finished law school in '85.

Q When did you pass the bar?

A '90.

Q So when you were director of the T.B.I., you were a lawyer?

A That's correct.

Q When you were working for T.B.I. you were involved in a lot of criminal prosecutions, but you never tried [43] a case, did you?

A No.

Q Have you tried a jury trial?

A Since I have become a D.A?

Q Yes.

A I have participated in several trials.

Q When was the first one, when was the first jury trial?

A It may have been with General Radford, had a case up here that was transferred out of his county.

Q I know I helped participate in that, by helping him select a jury. After that, I participated in several murder trials here. One of them was Aaron Yelloweyes.

Q Did you—you had been appointed District Attorney General in August and six months later, Taco Bell happened basically?

A That's correct.

Q And then September that year, you were elected to the post?

A Yes.

Q And you are serving that term right now?

A That's correct.

Q Was there a period of time after you were -I guess it was after you were director and before you were appointed, that you were in private practice?

A Yes.

[44] Q When was that?

A No, not—appointed director of T.B.I.?

Q No, appointed District Attorney General?

A Yes, there was a time—I joined a local law firm here in Clarksville I think it was in March of 1993.

Q So from March to August, you were in private practice?

A Yes.

Q And what firm was that?

A It was with Cunningham, Mitchell, Hicks and Brollie and McMillan.

Q Mr. McMillan?

A Yes, sir.

Q Mr. McMillan was a partner of yours?

A We were not that relationship in that law firm is not partners.

Q You practice together in the same firm?

A Yes.

Q Is he a friend of yours?

A Yes.

Q He grew up in this community too, didn't he? Did you know him then?

A No, I did not.

Q You are older than he is?

A I believe I am older than Larry. I'm not sure.

[45] Q Mr. Puckett, is he a friend of yours?

A Yes.

Q You are basically the only boss that he's ever had since he got out of college in one form or another? Isn't that right?

A Well, I wasn't his boss when I left T.B.I.

Q For a couple of months there?

A Yes.

Q And then you became Attorney General and you are in a position where you direct his duties today?

A I make requests of him, yes. I don't direct his duties everyday.

Q Is he a friend of yours?

A Yes.

Q Do you recall in these events that transpired here, whether he World Series had any impact on these inter-

rogations, interviews? Did you go to the World Series that year?

A No.

Q Do you know if Mr. Puckett did?

A Yes.

Q He did? So it was Mr. Puckett that went to the World Series?

A I think so.

Q Do you know who he went with?

[46] A It may have been Detective Charvis. I had the opportunity to go and I wish I had gone. I didn't go. Was it in Atlanta?

A Yes.

Q So they had tickets for a game—was it the series—a week?

A It was for the World Series, they had tickets for one game and I don't remember which one it was.

Q It was one game that they went to?

A I can remember that it was at least one. I think it was the final? The one where the Braves won the World Series in Atlanta

Q Do you recall that having any impact on the thing that we are here about today, Housler statements. Do you remember any adjournment of the Housler statements until they could get back from the World Series or anything like that? Do you have any recollection of that?

A I don't remember that.

Q You testified that—well, let me just ask you. What brought to your attention for the first time David Housler? What abrought David Housler to your attention for the first time relative to Taco Bell?

A The best that I can remember, his name came up because he had been charged with an aggravated robbery, along with Melanie Darwish and that is the bet that I can remember the first time that it came up.

[47] Q How did that connect with the Taco Bell, you're talking about the Grandpa robbery, right? How did that connect to Taco Bell?

A I think he was interviewed, he was initially interviewed in March, I think it was March 7th. To be honest with you, I can't remember without looking at the statement how his name first came up. I know that it did and then he was considered—and it may have been because he had gone to this trailer that was in Oak Grove, Kentucky.

Q Well, do you know—can you think of anything that brought David Housler to your attention before you had a conversation with Mr. McMillan?

A I believe the first time that I even saw David Housler was down at the police department, he had been interviewed one time.

Q Do you have any recollection whether or not, before you saw him, that you had had any conversation with his lawyer, Mr. McMIllan, about Housler and Taco Bell information?

A I don't remember that.

Q So is it fair to say that as of today, the first recollection you have about Housler is being present at some interview in March of 1994?

If I might, I need to look at some notes that [48] I have made—

MR. TERRY: Do you mind if I see those notes?

GENERAL RADFORD: Your Honor, he would like to look at them first and then after he does that, they can. But I think the witness ought to be able to look at his own notes first.

THE COURT: In the first place, witnesses aren't supposed to have notes unless they are properly given. In the second place, once these are referred to, Counsel can look at them.

THE WITNESS: Will you ask your question again?

MR. TERRY: My last question was whether or not you had any recollection of any knowledge of contact with David Housler relative to Taco Bell, before being present for a March 24th, interview?

A There wasn't a March 4th interview that I knew of?

Q I meant March '94 interview?

A The first time that I had any dealings with Mr. Housler was on or about March 10th, when a polygraph examination was given to him at the office. I believe that is correct. Prior to that, an interview had been conducted with Mr. Housler by the Detective Elliott and Agent Puckett I believe, out at Ft. Campbell, Kentucky.

Q Do you have any recollection of any conversation [49] with Agent Puckett after the Ft. Campbell interview of Mr. Housler?

A I am sure that I did, but I can't recall it right now exactly what it was. It would probably be over the contents of what that statement was at Ft. Campbell.

Q Do you have any recollection of being involved, in any way including recommendations or suggestions with regards to the setting of the bond on the aggravated robbery warrant that caused the arrest of Mr. Housler for the Grandpa's robbery?

A No.

Q After he was arrested and brought to Ft. Campbell and was in custody here, you gave him a polygraph examination?

A There was one administered to him.

Q Who administered that?

A I believe it was Lannie Wilder with T.B.I.

Q Was that done at your direction?

A I don't recall if it was done at my direction. I was probably done at Agent Puckett's direction.

Q What would be the purpose at that point? What were you testing?

A It was probably arising out of the first interview. The investigators felt like he wasn't telling the truth.

Q In the first interview?

[50] A Yes.

A Do you recall whether the polygraph examination indicated whether he was telling the truth at the first interview?

A To the best of my recollection, he failed the polygraph.

Q Would you take a look at Exhibit 1 and inset 2—

(WITNESS COMPLIES WITH REQUEST.)

Q Do you see a statement there?

A Yes.

Q 3/7/94 statement, is that the one you are looking at?

A Yes.

Q I am not going to spend much time with this because you weren't there for this, but—it was copied for you and this is the statement that Mr. Puckett told you about and subsequently Mr. Housler was subjected to a polygraph about?

A I think that would be a fair statement.

Q Now, let's look at the next inset 3.

(WITNESS COMPLIES WITH REQUEST.)

Q This appears to be a statement on March 21, 1994? Is this the first time that you met With Mr. Housler?

A Yes. I think that's correct.

[51] Q I don't mean to be repeating myself, but your testimony at this point, you don't recall any discussion with Mr. McMillan before this interivew?

A No.

Q Could there have been some discussions about trading information for bond reduction?

A Yes.

Q You just don't recall it?

A I just don't recall it. I know his bond was reduced.

Q Was there a polygraph administered after the March 21 statement, to your knowledge?

A Yes.

Q How did he do on that one?

A To answer your question, I don't know which day you are referring to, but he was—I know and I do recall that Mr. McMillan did participate in the formulation of some polygraph questions at our office prior to the proffer agreement being entered into. There were some specific questions that we wanted to have answered pertaining to Mr. Housler's involvement, and I know that—I know that he may have passed one question? On all the other examinations, he failed the questions?

Q Well, in your dealings with Mr. Housler, do you know how many times you caused or the T.B.I. has caused [52] him to be polygraphed?

A I think he was polygraphed twice. I know he was polygraphed at least that many times and he was polygraphed prior to going into the proffer agreement.

Q Who do you recall being present during the March 21 interview?

A Of course, David Housler was there, his attorney was there. I think Steve Garrett and myself were there, along with Agent Puckett, who was taking the interview.

Q How was the interview conducted? Did Mr. Puckett ask questions?

A He did the questioning, the best that I remember.

Q Did anybody else?

A Steve and I could have asked some questions, but I think at that point, we left the questioning up to the investigator.

Q Now, I would like to just briefly ask you if these facts are consistent with your recollection. After that March 21 interview, the bond was reduced and he makes the bond and he is gone? And you or your office or T.B.I., to your knowl

edge, don't have any contact with Mr. Housler for fifteen months, is that correct?

A I believe that's correct.

Q What is—and that puts us around October of 1995, what would be your information with regard to renewinG [53] contact so to speak? Why is it done and how did you do it?

A I think General Garrett and I discussed that we needed to lay the matter concerning David Housler to rest, resolve it one way or the other. Particularly, we were operating over—I particularly had focused in on an interview with Michael Miller and the statements that were attributed to Mr. Housler and some of the facts surrounding what I call the Miller statement. Also, there were unresolved questions pertaining to failure of polygraph questions by Housler, and Steve and I both decided that we would call Mr. McMillan and have Mr. Housler come back to try to resolve those issues.

Q What type of involvement was indicated to you regarding Mr. Housler by the Miller statement?

A Well, the best that I can remember and I may not get all the names right, but he, Charlie Brown, Red Tween, Melanie Darwish, went down to the Taco Bell and they were outside and that Tween went inside with Courtney Mathews. Courtney Mathews was wearing a black, three-quarter length coat, carrying a .9 millimeter. Tween had the shotgun. They did the robbery. The people were killed in the back room of the restaurant, the kitchen area—

GENERAL RADFORD: Your Honor, I haven't objected, [54] but we are going into matters that have nothing to do with whether or not the defendant's statement is voluntary? Going into why he was questioned? It makes no difference why he was questioned. The fact is he was questioned, he did make a statement and I felt like that that was the issue now that we are litigating.

MR. TERRY: I won't ask any more questions about the Miller statement. I just wanted to know what was in his head when he called him in, what he was thinking that type of thing.

THE COURT: Move on then.

Q (By Mr. Terry) Were there any other items other than the Miller statement and the failure of the polygraph that raised this kind of—this Housler question that you and Mr. Garrett were trying to resolve?

A Yes. He had been interviewed October 11th, 1995, again at our office with his attorney present. The interview lasted about—from about 2 o'clock in the afternoon until about 6:15, approximately. There were several things that he was questioned about and asked, but in particular at that point to the best of my recollection, he had admitted to "gassing up Courtney Mathews". There was a 187 mentioned. I believe that those mentioned at that time. But there were a lot of things that were said that needed to be resolved [55] pertaining to Mr. Housler's involvement or not involvement.

Q But the 10/11—the October 11th meeting was the first time that you had had any contact with Housler for fifteen months or so, right?

A Right.

Q What I am trying to get at—I realized that 10/11 occurred, but what I am trying to get at is before you had him for the October 11th, what was concerning you and Mr. Garrett other than the Miller statement and the failure of the polygraph?

GENERAL RADFORD: I object, it's relevant what concerned him. The fact is that he did interview him. The reasons are irrelevant.

MR. TERRY: It's important because at that interview—if that was a target type inquiry, we have one situation. If they are looking at him as a target, that's one thing. If they are

* * * *

A I used some notes that General Garrett had gone back over and made during that process.

Q Did you ask General Garrett to help you get ready in that sense, to testify?

A No.

Q The Judge has said that we should cover one other subject here and I will cover it quickly and that's November 7th. Is it fair to say that on November 7th, you caused Mr. Housler to be brought back to the D.A's office? You invited him and his lawyer back?

A Yes.

Q For what purpose?

A To confront him in reference to the investigation from the time that it had been conducted between the October 20th statement up to that time.

Q Had you determined at that time that part 8 to exhibit 1, the agreement that you had with Mr. Housler, had been breached?

A I didn't determine that until I interviewed Sulyn Uglanca.

Q What day was that?

A What day?

Q Uh-huh (indicating yes by sound).

[84] A November 7th.

Q Is that the same day that you indicated David Housler?

A Later that afternoon, yes.

Q Was the grand jury in session or did you cause the grand jury to go into session?

A It was already in session.

Q At what time during that day did you determine to indict David Housler?

A Sometime after 1 o'clock, I guess.

Q What time did you appear before the grand jury?

A Sometime that afternoon. I can't be—I didn't clock it.

Q Did you take this statement before the grand jury, these statements before the grand jury?

A I didn't take anything before the grand jury.

Q Were those statements before the grand jury? Did Agent Puckett take the statements to the grand jury?

A Yes.

Q The grand jury was shown the statements that you had determined by 1 o'clock were false, is that correct

A There were certain things in the statements that were false.

Q You or anybody in your presence before the grand jury, describe those differences to the grand jury?

[85] A I didn't.

Q Were you angry when you did that?

A No, I am not—never angry.

Q On direct testimony, General Radford asked you the contract—that Mr. Housler had not met certain conditions of the contract that you had with him, is that right? And you testified that one of those conditions was that it be a truthful statement, is that correct?

A Yes.

Q Had he breached his obligation to be truthful?

A Yes.

Q And had you determined that by one o'clock on November 7th?

A Yes.

Q And what other breaches of this contract, had he caused?

A Beside the Sulyn Uglanca?

Q Besides being truthful—

A He breached that in my opinion and by his own admission.

Q What? He breached what?

A He breached that portion of it involving Sulyn UglancA He went back and told his attorney and his attorney came back and said that the statement is correct except for her

involvement. She wasn't down there, and [86] I considered that as the breach of the agreement. That was the most serious breach of the agreement.

Q Look at your notes and see if he didn't also say in that same statement that I wasn't down there either? He told you he wasn't down there either?

A He did not make that statement to me. He made it to Agent Puckett and Detective Charvis after he broke and ran. He did not make that statement to me.

Q Which is before you went to the grand jury?

A Yes.

Q Just again—not to argue with you, but is there anything else in the agreement that you determined to be a breach? Is there any other reason why you determined not to enforce the agreement?

A There was a—one item—David Housler claimed that he had purchased a .9 millimeter star weapon from a Joey Carman from Ratcliffe, Kentucky and he had been interviewed and made the statements to the agents that interviewed him, that he had not sold—he, Joey Carman, had not sold David Housler a .9 millimeter, but six months prior to that, he had sold him a revolver.

Q So you know that the .9 millimeter portion of the statement was not true? Or you felt that it was not true?

A I felt like that it was a breach of the agreement. [87] He hadn't told the truth on that particular item.

Q Because he had lied about whether or not he had a .9 millimeter, is that correct?

A That he had lied about not having a .9 millimeter?

Q No, in the statement he said that he had a .9 millimeter and you had determined by November 7th, that that was a lie?

A He said in the October 20th meeting, that he had a star .9 millimeter?

Q Right, and by the time you indicted him, you had determined that that was a lie, is that correct?

A The lie was that he had purchased a .9 millimeter from Joey Carman.

Q Right, when you went to check that out, Carman said I didn't sell him a .9 millimeter, I sold him a revolver?

A Some six months before.

Q And so you considered Housler's representation that he had purchased a .9 millimeter to be a lie? He purchased the .9 millimeter from Carman to be a lie?

A Yes.

Q And you considered that a breach of his obligation to be truthful?

A Yes.

Q Anything else?

[88] A No.

MR. TERRY: Your Honor, could I have an opportunity to confer with Ms. Gore? She has had some time and I have not?

THE COURT: Certainly.

(WHEREUPON, Court was off the record briefly.)

MR. TERRY: Your Honor, I don't mean to infer that anything inappropriate is happening. I think General Radford is correct. These notes indicate statement that we don't have and interviews that we don't have and we would certainly include—I think there has been so much of this, it's nobody withholding anything, but it will be helpful to us if we could just get a copy of this and maybe a copy for the Court and then let me ask questions—

THE COURT: Ms. Ferrell, would you take those index cards and go over to Chancery Clerk's Office and make a front and back copy of the three cards?

(COURT OFFICER COMPLIES WITH REQUEST.)

MR. TERRY: I don't have questions except for those notes.

THE COURT: Redirect?

APPENDIX G – Excerpts, D.A. Carney, *Housler* Trial testimony

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

CASE NO: 39217

STATE OF TENNESSEE,

Appellee,

versus

DAVID G. HOUSLER,

Appellant.

** TRANSCRIPT OF THE EVIDENCE **
November 14th, 1997
Part B of A & B

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[248] Q Now, having made that decision, and having allowed Mr. Housler to go back to Kentucky, did you do or cause anything to be done in relation to Sulyn Ulangca?

A Yes, sir, I did. I had law enforcement officers, T.B.I. and Clarksville Police Department, the two primary investigators in this case, I instructed them that I wanted them to go to North Carolina where Sulyn Ulangca was living at the time and to question her because Mr. Housler had indicated her as being with him and was sitting in the car with him when this occurred.

Q Did you then send those people to North Carolina?

A Yes, sir, they were sent I believe somewhere around October 25th or 26th, they went to North Carolina.

Q Did they interview her?

A Yes.

Q Was her interview a cause of concern for you?

A Very much concern because she denied it. She had a child at that point in time and she denied any involvement whatsoever in the Taco Bell murder case. She was told how she was indicated by Mr. Housler in the statement that he had given. She was further questioned by State Agents from the North Carolina Bureau of Investigation. She was in essence offered immunity from prosecution if in fact, she was sitting in the car doing nothing more than sitting there. She totally and absolutely [249] denied any involvement in it and the statement that Mr. Housler gave was false.

Q Did you ask her then to return to Tennessee?

A Yes, sir, that was one of the things that I wanted to make sure that the law enforcement officers did. After they talked with her, would she be willing to come back to Clarksville under the circumstances and look David Housler in the eye and tell him that he was a liar?

Q And did she do so?

A She did.

Q And when did this meeting happen? If you know?

A It was November 7th, 1995.

Q Did you ask Mr. Housler to return to Clarksville? Yes, we did.

Q Did he return?

A He returned and he came back with his attorney and they were in the library room and while we were conducting an interview with Ms. Ulangca.

Q What happened next?

After we finished—myself, General Garrett and General Bush conducted an approximate hour interview with Sulyn, at that point I was also convinced along with General Garrett and General Bush that she did not have any involvement in the crime as Mr. Housler had [250] indicated. At that point, we asked her would she be willing to go and confront him as to the statement that he had given? She said that she would, that was one of the reasons why she came back.

Q Did you then say anything to Mr. Housler?

A Yes, we did. We went back into the library where he and his attorney were sitting and I took the lead at that point and I remember telling David that we had Sulyn Ulangca here, that she had been interviewed in North Carolina. She voluntarily returned and that he had implicated an innocent person and that she was willing to come in and look him in the eye and tell him so?

Q What was his reaction?

A And to confront him. His reaction was he did not want a confrontation with her. That he had, in fact, implicated her, an innocent person.

Q How did he answer those particular allegations, that he had implicated—you made allegations to him that he had implicated an innocent person?

A That's correct.

Q How did he answer those allegations?

A He said I agree, yes, he did.

Q Then what happened?

A At that point, because that was a breach of [251] our agreement and I considered it a very extreme breach of the agreement, because he had implicated an innocent person. In fact, admitted that he had implicated an innocent person. General Garrett and I got into discussions with Mr. McMillan and basically told him that we felt like—I felt like that he had committed a material breach of the contract, the agreement that we had entered into and plus, he was failing to cooperate with the State because of the confrontation and that the agreement was going to be revoked.

Q Did Mr. Housler learn that the agreement was going to be revoked?

A Yes.

Q What happened then?

A Well, sometime after that—

MR. TERRY: I am going to object to anything that this witness didn't observe. I believe he's about to testify about things he didn't observe.

THE COURT: Lay a foundation.

Q (By General Radford) Do you know what happened then?

A Yes.

THE COURT: Mr. Radford, lady a foundation based on personal knowledge.

Q (By General Radford) What did you see?

[252] A I didn't see anything, but I heard it.

Q What did you hear?

A I was sitting in my office. In fact, I was talking with another District Attorney who was up there on another matter and I heard someone running from the third floor library area and the door opening real fast and I heard other footsteps of people running down our hallway.

Q Did you get up to see what was the matter?

A I sure did. I got up and found out that—

Q What did you see?

A Well, I eventually saw Mr. Housler being led back up the stairs by a T.B.I. Agent who had happened to be standing down at the bottom of our stairwell—

MR. TERRY: I think I object to this testimony, I believe this is something that he did not observe.

THE COURT: Please lay the proper foundation for personal knowledge, separate the testimony from personal knowledge and other information.

Q (By General Radford) You say that you saw Mr. Housler being led up the stairs?

A Right, and brought back into the hallway from which he ran from.

Q Did you see who brought him?

A Agent Mike Breedlove was one of the T.B.I. [253] Agents and at that time, Detective Charvis and Agent Puckett were also present.

Q Then what did you do?

A At that point, a determination had to be made as to Mr. Housler's status.

Q Did you make a determination?

A Yes.

Q What was the determination?

A The determination was that he had materially breached the agreement that we had entered into and that we should proceed on with prosecuting him and utilizing the statement that he had been given, against him.

Q What did you do then?

A The case was presented that day to a Montgomery County grand jury, that afternoon and the grand jury returned an indictment.

Q Now, from a logistics standpoint, at some point did you become necessary that your office recuse yourself?

A Yes, we had to recuse our office because it was determined that myself and General Garrett would potentially be a witness in this case.

Q And Judge Bush also?

A Judge Bush also, yes.

Q I was appointed by the Conference?

A You were appointed to take over the prosecution [254] on the case against David Housler by the Tennessee District Attorney—

MR. TERRY: Object to the relevance, Your Honor.

THE COURT: Sustained, disregard. Go ahead.

Q (By General Radford) Were you, in fact, a witness?

A I am here today.

Q Now, the statements other than the statements you mentioned on October 10th, were they reduced to writing?

A Yes.

Q Did Mr. Puckett take those statements?

A Yes.

Q It was your understanding that he will testify and present those statements?

A Yes, sir.

GENERAL RADFORD: That's all I have of this witness, Your Honor.

THE COURT: Cross examination?

MR. TERRY: Could we approach, Your Honor?

THE COURT: Yes.

(WHEREUPON, a side bar conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

MR. TERRY: I didn't get the last break [255] because I had to read those records. I have been in here since we came back from lunch and I need a break. If I could have one now?

THE COURT: All right.

(WHEREUPON, end of side bar conference.)

THE COURT: We will take a ten minute break. Please remember your admonitions. If you would move into the jury room?

(WHEREUPON, Court was recessed briefy; Court was again called to order; the jury returned to open Court, and the following proceedings had:)

THE COURT: Mr. Terry, you may cross examine.

CROSS EXAMINATION

BY MR. TERRY:

Q General Carney, you testified that before you became a lawyer that you spent twenty years as an investigator, is that right?

A That's correct.

Q You rose to the top of your agency—

A Yes, sir—

Q —your profession in this State?

A Yes, sir.

Q You became the Director of the Tennessee Bureau of Investigation?

[256] A Yes, sir.

Q In 1993, you left the T.B.I. and you went into private practice in this town, in Clarksville?

A Yes.

Q And that's the town that you grew up in?

A Yes, sir.

Q And six months later, after being in private practice with Mr. McMillan, by the way, is that right?

A Yes, sir.

Q You became, you were appointed by the Governor as the District Attorney because there was a vacancy?

A That's correct.

Q And that appointment was in November—

A It was—the time actually started September 1st, 1993, that's the date that I was sworn in.

Q September 1st?

A Yes.

Q So four months later, after your appointment as District Attorney, you had the worst crime in this City's history dumped in your lap, isn't that a fair statement?

A Yes, at that point.

Q At that point, how long had you been a lawyer? Probably four or five years.

Q And you had been District Attorney for—

[257] A Four months.

Q What are the obligations, General Carney, when it comes to speaking in a courtroom?

A (No audible response).

Q Let me make it—let me ask this question. Do you believe that a lawyer has an obligation to be truthful when speaking in the courtroom?

A Yes.

Q And when a lawyer is addressing the jury, what is the lawyer's obligation?

A His obligation is to be truthful.

Q Is there any qualification for that obligation that you know of?

A No.

Q Is that obligation imposed upon the District Attorney as well as it is upon me?

A Yes, sir.

Q Now you were a lawyer in the Courtney Mathews' case weren't you?

A Yes, sir.

Q You prosecuted that case, didn't you?

A I was one of the Prosecutor's, yes.

Q And you addressed the jury in closing argument in that case, didn't you?

A Yes.

[258] Q Did you state to that jury in 1996, General Carney, "The State of Tennessee says at this point in answering that the evidence in this case is overwhelming, that the evidence in this case points to one person, and that is the defendant right here" and then you indicated with your finger. "No one else", you said. Did you say that word, in this room to a jury in the Courtney Mathews' case in 1996?

A If it is recorded in a transcript, then I said it.

Q Do you want to look at the transcript? Yes, sir.

(WHEREUPON, the witness is furnished with above-mentioned transcript.)

MR. TERRY: If Your Honor please, I would like to ask some other questions over the next couple of pages so that if you would like to review that argument and those pages and it begins with the one that I have just opened.

(WHEREUPON, witness inspects above-mentioned transcript.)

THE WITNESS: Okay.

MR. TERRY: Have you had an opportunity to review your entire argument?

THE WITNESS: No, not the entire one—just this statement that you covered.

[259] GENERAL RADFORD: Your Honor, may we approach?

THE COURT: Sure.

(WHEREUPON, a bench conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

GENERAL RADFORD: I think that Mr. Terry is getting dangerously close to asking Mr. Carney's opinion, and getting into his opinion, that he believed and what did he believe?

Of course, if he opens up Mr. Carney for his opinion, he is opening up Pandora's box because Mr. Carney may have other opinions and if he is entitled to express one by the Defense, I feel like he is entitled to express those of the prosecution. I don't think that's a proper way to proceed. It is not the way that I would wish to, but I think that's the avenue that we are going down. I think that it is a very dangerous road for the defense.

THE COURT: He can think about what you said.

(WHEREUPON, end of side bar conference.)

Q (By Mr. Terry) Did you stand, Mr. Carney, where I am standing and looked at the jury in 1996 and make that statement?

A Yes, I did.

[260] Q You told them that the evidence in that case, in the Courtney Mathews' case, that the evidence was overwhelm-

ing, that the evidence points to one person and that is the defendant and no one else? You made that statement?

A Yes, sir.

Q Was that a truthful statement?

A That was a truthful statement as to what I considered that the evidence was in the case at that point in time against Courtney Mathews.

Q Did you argue before that jury that Mr. Mathews used a shotgun within the Taco Bell Restaurant?

A I can't remember exactly how we argued that, but we certainly could put the shotgun in Courtney Mathews' hands along with the other weapon. Of course, no -Mr. Terry, there were no survivors down there, there are no eyewitnesses to that case and all we had—we had to use whatever evidence that we had and what evidence pointed to at that point in time to Courtney Mathews.

Q I understand. Did you make this argument to that jury with regard to the ammunition? Did you say who went and bought the ammunition that was used in the gun very similar to this?

A Yes, sir, I did.

Q The Defendant did, you said, didn't you?

[261] A The Defendant, Courtney Mathews, did.

Q So you argued to that jury in 1996, not argued, you told that jury that Courtney Mathews bought the ammunition that was used in this crime, didn't you?

A Yes, sir.

Q Was that a truthful statement?

A Yes, sir.

Q Did you argue to that jury in 1996, "we can put both of these weapons in the defendant's possession, the last time, 10:30 at night, when the defendant left his home wearing clothes, layered clothes. Who had the bag? The Defendant had the bag. Whose house did he leave? His house." Did you make that argument?

A Yes, sir.

Q Was that truthful?

A Yes, sir. It was true based upon the facts in evidence.

Q Based on the facts and evidence, is that your perception of what your obligation is, Mr. Carney, that you only have to be truthful with regard to the facts and the evidence or do you have to be truthful with all the facts that you know?

A I think at the point that we were arguing, making that argument, those facts were in evidence in the case and I was making argument as to what the State had been [262] able to prove at that time.

Q Well, at that time, that time was May and June of 1996, correct?

A Yes, sir, at the time of trial—is that what you are referring to?

Q Right.

A Yes.

Q Long after you had indicted this man for the same crime?

A That's correct.

Q So any information you had for him or about him, you knew when you stood before that jury and said that Courtney Mathews left his home at Ryder Avenue at 10:30 and that he had the bag and he had the gun? You knew that, didn't you?

A And that was what was in evidence, and that's what the testimony showed.

Q Did you argue to that jury in 1996, that the defendant, Courtney Mathews, was in the ceiling of the Taco Bell Restaurant?

A I don't recall that. I know that that was a possibility, not necessarily that it occurred. There were several different theories pertaining to that.

Q "Went into the Men's restroom, got up into the ceiling." Were those your words?

[263] A If they are in the transcript, yes they are, and they can be inferred from the evidence that was in the—the facts and evidence that was in evidence at trial.

Q Actually, you tried that case on the theory that the disturbance , the ceiling disturbance was relevant to the crime, didn't you?

A Yes.

Q Why, why would somebody up in the ceiling be the lookout?

A I have to go back to answering that, there was never any actual proof that someone was up in that ceiling. There was some—that was a theory. The other theory was that that was merely a staging to make it appear that someone was up in the ceiling.

Q What is your theory?

A I don't know. I know what was in the evidence—

GENERAL RADFORD: Your Honor—

MR. TERRY: What is the State's theory, Mr. Carney?

GENERAL RADFORD: May we approach—I object. (WHEREUPON, a side bar conference was had between Court and Counsel, within the presence, but outside the hearing of the jury as follows:

[264] GENERAL RADFORD: I think it is improper to ask the witness for his opinion or theory even if he is a lawyer, he's still—it's still an opinion and conclusion.

MR. TERRY: The witness said theory, it was a theory and—

THE COURT: This is cross examination. Tennessee allows open cross examination. If Mr. Terry wants to ask him about it, given the fact that the witness offered it, I can't stop it, justifiably, so—you may proceed.

(WHEREUPON, end of side bar conference.)

Q (By Mr. Terry) Mr. Carney, what is your theory about this case?

A In what regard? What part of it?

Q In regard to how this murder was committed? How was this murder committed? You investigated this case, you prosecuted this case, you have twenty years in T.B.I., you are District Attorney General of this county. Tell this jury how this murder was committed.

A I think Courtney Mathews entered the Taco Bell Restaurant under a guise of planting a billfold there because he was seen by one of the employees hiding behind a bin. When she saw him, he made the statement to her like you didn't see me here? This was while he was on-duty working that night. I think he came back down there [265] under that disguise and was able to get in, that he had left his billfold there. That he came inside by himself because none of the employees there, particularly the manager that was on shift there, would allow any other person in. It was policy and regulation by the Taco Bell. At one point, we felt like that some guns may have been hidden up in the bathroom, prior to him coming there and that would have been helped by other people to do that, or he, himself could have done it? I think that he—we had witnesses there that saw him there at 1:30 in the morning and identified him, that came through—

MR. TERRY: That's an eyewitness, Mr. Sanford, an eyewitness?

THE WITNESS: Yes, sir.

Q Saw Courtney Mathews in the Taco Bell at 1:30, right?

A That's what his testimony was—

Q The other lady that you testified about, Jalayne (phonetic) Walker, the employee that saw him in the back of the restaurant, that was before midnight, right? Would you agree with that?

A It was before he left. He checked out about sometime around 9:17, I think that's correct. I don't remember the exact time. Do you want me to proceed on?

[266] Q Sure.

A I think at some point in time, after being seen there at 1:30, 1:30, 1:45, he came out of—I think he was wearing a black coat, there was evidence to that. I think he went in—he could have possibly gone in there with the weapons as Mr. Housler said in the statement, pulled right up to the side window there and asked one of the employees, who Mr. Housler identified—you are asking my theory—

Q Go ahead.

A I am giving it. I think at some point, he got the weapons, particularly the .9 millimeter that was used and came back and caught all four of the employees by surprise. I think the first person that was shot was Kevin Campbell who was standing at the door when he came through it and he fell where he was shot. There was a series of volleys of shots that were found, were shot in the area where Patricia Price was found along with Angela Wyatt. All of the first initial volley of shots, the employees could have lived as there was medical testimony or that would have been through Dr. Harlan. I think that Angela—excuse me, Marcia Klopp was in the office area there counting the proceeds for that night and she came out of there and was shot. I think at that point, and I think it is backed up by the medical [267] testimony that—I think he walked back over, put the gun to the top of Patricia Price's head, point-blank, fired the weapon either one or two times. Turned to his right to where Angela Wyatt was underneath the sink. She was shot two times execution style in the head. And then he turned to the left where Kevin Campbell was and then shot him. And he threw his hands up—

Q He being Courtney Mathews?

A Kevin threw his hands up in a defensive posture. At that point, I think he went back over to—

Q When you are saying "he", you're talking about Courtney Mathews?

A I am talking about Courtney Mathews. He went back over to Marcia Klopp who was still alive, who lived the longest and attempted to probably get her to give him the keys to the safe or to give him the combination to the safe. She either would not do that and at this point—this could not be what happened, but a series of shots were found in that area and then she was excuted at point-blank range.

Q By Courtney?

A Yes. And at that point, I think the shotgun and/or .9 millimeter was used to attempt to get into the safe. It was used to blast the safe dial open. I think at least one or two .9 millimeter shots were shot [268] at the safe. At some point in time during this and by other witnesses, the outside lights flickered at least twice.

Q Let me ask you one question. Do you accept the testimony of Mr. Ballard who says that he was up there at 2 o'clock and everything was okay and everybody was alive?

A I think that that's somewhere after 2:30.

Q After 2:30?

A Yes, because witnesses independent from that heard the shots and saw people running. They also witnessed lights flicker at least twice. I think that there were other people involved.

Q Why?

A Because independently people saw other people there.

Q Name somebody.

A Jolly for one.

Q Jolly, okay. Who else?

A I cannot think of the other man—I know Hudsputh

Q Hudsputh and Jolly?

A And there was another man, I can't remember his—who also heard the shots. And they saw a flurry of car activity around there also.

Q Car activity at that corner on Saturday night?

[269] A That's correct.

Q I am asking you, based on this wealth of knowledge that you have and experience, to tell me why you think anybody else was involved and you said Jolly and Hudsputh and car activity. Anything else?

A Yes.

Q What?

A I don't think that one person acting alone could have done this. I have always felt that.

Q Tell me the evidence that indicates this—

GENERAL RADFORD: Your Honor—

THE COURT: Sustained.

MR. TERRY: I am sorry. Tell me what indicates that somebody else is involved besides what you have already told us.

A Because of statements from people that were given to the investigators that were corroborated almost a year after they were given by people that would not have known unless they were involved.

Q You're talking about the party trailer stuff?

A No, I am talking about people that associated at that trailer and associated with David Housler and Courtney Mathews and Red Tween and Melanie Darwish and all those people.

Q Do you think Melanie Darwish was involved in [270] this murder?

A She very well could have been.

Q Do you believe—do you think she was?

A I think she—as far as I am concerned, she is still considered a suspect in the case.

Q Have you ever arrested her, indicted her or anything?

A No.

Q Do you think that Red Tween was involved in this murder?

A I think he possibly could have been involved, yes.

Q Ever arrested him?

A No.

Q Indicted him?

A No.

Q Investigated him?

A Yes, sir.

Q Have you questioned him?

A Extensively.

Q Have you found out every piece of information that you could possibly find out about Red Tween and his involvement?

A We did it the best that we could, Mr. Terry. We just didn't have enough evidence to charge him.

[271] Q The same with Darwish?

A Yes.

Q You have—you have used every resource available to you to find out everything you can about Darwish?

A Yes, up to this point.

Q And you haven't charged her?

A No.

Q Anybody that says that they lined the victims up, hands and knees, and executed them by shooting them in the back of the head in a line, is nonsense, isn't it?

A I don't think it's nonsense. It didn't correspond with the crime scene and they weren't lined up. They were at their stations, working, doing something as part of the cleanup at the time of the cleanup and they were caught totally by surprise and they fell where they were shot.

Q One more statement—let me ask you if you made this statement to the Mathews' jury. "Ladies and gentlemen, I submit to you and I am closing at this time, that all of the evidence in this case points squarely and directly in the face of Courtney Mathews." Did you make that statement?

A Yes, that's a true statement, because the evidence that was submitted to the jury at that time was directed [272]

towards Courtney Mathews. It was not directed towards David Housler.

Q Other than Housler's statement—let me strike that. Let's take a look at this statement.

Your Honor, I realize this statement has not been admitted and I don't want to—

THE COURT: Confer?

GENERAL RADFORD: Your Honor, the State intends to admit the statement.

THE COURT: Any objection?

GENERAL RADFORD: No, sir, we are going to.

THE COURT: All right—

MR. TERRY: May I tender?

THE COURT: Yes.

GENERAL RADFORD: May we approach the bench?

THE COURT: Yes.

(WHEREUPON, a side bar conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

GENERAL RADFORD: Mr. Terry by tendering this statement to the witness, I would ask if he is waiving any objections that he has made?

THE COURT: Well, I think what he wants [273] to do is cross examine this witness because he is here and he can call him back after—see what I am saying?

GENERAL RADFORD: Yes, sir, I do.

MR. TERRY: Let's have it marked for identification purposes, that way he has one and I have one. I can ask him about it.

GENERAL RADFORD: All right, sir.

(WHEREUPON, end of side bar conference.)

THE COURT: Counsel, then without objection, I will mark this for identification purposes only, is that satisfactory, Counsel?

MR. TERRY: Yes, Your Honor.

THE COURT: Mr. Radford, I am not sure that I got a vocal from you?

GENERAL RADFORD: Yes, sir, I beg your pardon.

THE COURT: Marked as 83, I.D. only at this time.

(WHEREUPON, Trial Exhibit Number 83 was marked for identification purposes only.)

Q (By Mr. Terry) General Carney, can you identify this as the October 20th statement of David Housler?

A Well, the problem that I have with it, I don't know if this is the exact word-for-word, it's different, totally different from what the T.B.I. statement, [274] the handwritten statement and other statements are. I am not sure that this is the same one?

GENERAL RADFORD: Your Honor, I would stipulate that it has been retyped and I would stipulate to him that it is the statement that he gave.

THE COURT: So ordered, that it is the statement dated October 20th, 1995, correct, Counsel?

MR. TERRY: Yes, Your Honor.

THE COURT: Correct, Mr. Radford?

GENERAL RADFORD: I am checking to be—that's what it is supposed to be, Your Honor—yes, that's correct.

Q (By Mr. Terry) General Carney, I would ask you to turn to page 2. I want to go to the portion of the statement that

has to do with January 29th, 1994. Do you see where it says on the Saturday night before the Super Bowl?

A Yes, at the bottom?

Q Yes.

A Yes.

Q Now, the statements says on "Saturday night before the Super Bowl, I came to the trailer—I, Housler and Mathews, Kendra Corley, Tween, Darwish, Ulangca were there when Sulyn Ulangca and I arrived." Do you see that part?

[275] A Yes, sir.

Q And then Mr. Housler says, I believe, "that he went to the trailer about dark", is that in your—

A "It was dark or almost dark."

Q Now, here is my question. Housler's statement says that he went to his Oak Grove about dark on January 29th, 1994 and that Mathews was there." And that's not true, is it? Is that true?

A To be honest with you, I can't remember where Courtney Mathews was? Is that what you are asking me?

Q He was working at Taco Bell, wasn't he? Didn't you just tell me that he got off at 9:11 or 9:16?

A Yes, sir.

Q So he couldn't have been—he wasn't at the Oak Grover trailer at dark, was he, on that day?

A He should have been working at Taco Bell.

Q He was, wasn't he? I mean, you investigated it—

A. He was—the only thing I can tell you is that his employment records or his work records show that he checked out at either 9:11 or 9:17.

Q Plus, you talked to the people there too, right?

A The investigators did, I didn't talk to them.

Q None of the investigators told you anything different, did they?

[276] A No.

Q Now, if Courtney Mathews is at Taco Bell, that's not true, isn't that right?

A Right.

Q And let me ask you this. Now, you got this statement in 1995. Did you have Courtney Mathews' records, his time records from Taco Bell?

A We had his time out sheet that reflected what time he left Taco Bell.

Q Well, didn't you look at that and look at this and say it can't be true? Mathews was at Taco Bell?

A I didn't look at it at the time.

Q Did you look at it before you indicated him for first-degree murder?

A I probably did.

Q You did?

A Well, we had the statement.

Q When did you look at it?

A I looked at it probably at the time that it was given, or the next day after it was signed off on.

Q So you knew this was false?

A Not necessarily so.

Q Well, you either didn't look at the records or you did? If you looked at the records, they would tell you that this is false, is that right?

[277] A If you totally look at the record, yes.

Q Well—when you went over to the Montgomery County grand jury and indicted David Housler for four counts of first-degree murder, did you know that Courtney Mathews couldn't have possibly been at the Oak Grove trailer?

A Well, Mr. Terry, let me answer that, we have to look at the totality of this whole statement that he gave. Not—

MR. TERRY: I ask that he be responsive, Your Honor.

THE COURT: All right, respond to the question please.

Q (By Mr. Terry) When you went before the grand jury and took this statement as you said in direct examination and

indicted this man for first-degree murder, did you know that that portion of the statement when he said that he was out at the trailer on the night of the murder, with Mathews was false?

A To be honest with you, I don't recall sitting down and taking his statement and comparing it word-for-word on that. I did not do that at that time. I did not do that at that time.

Q So you personally did not compare the statement with the evidence that you had acquired when you indicted [278] this man?

A We looked at the statement in its totality and we looked at him admitting that he was there, him admitting that he was on the scene when it happened, and that coupled with other statements that he had given, and what other statements that we could prove or corroborate independently from what he was given.

Q If you would look at the next page for a second?

(WITNESS COMPLIES WITH REQUEST.)

Q Please, Mr. Carney, if you would read the first three paragraphs on the next page?

(WITNESS COMPLIES WITH REQUEST.)

A Okay.

Q And would you agree with me that it sets out some kind of scenario where Housler comes to the Oak Grove trailer, Mathews is there and Corley is there. Tween says "tonight is the night" and then Housler gets the assignment to go get the ammunition. Isn't that basically what that is? Housler is going to go get the ammunition, right?

A Right.

Q And then Housler goes over according to the statement, to Hippy Dude, some guy named Hippy Dude. He can't find Hippy Dude at the Showboat, whatever the name of this arcade is, so he goes over to Hippy Dude's [279] house and he buys ammunition from Hippy Dude, right?

A That doesn't state that in those three paragraphs. Are you referring to some place else?

Q Well, you're looking at the third—the next page now that one that says "I soon left the trailer and went over"—is that the fourth paragraph?

A It's the fifth paragraph.

Q I'm sorry. That's correct. That's what he said.

Q And Housler told you that he went and bought the ammunition, .9 millimeter and he bought shotgun shells for a shotgun that he does not know the gauge of and that that is the ammunition that was used in the Taco Bell murders, correct? Is that what that statement says?

A That's what it says.

Q So you knew at that time that Mathews had bought the ammunition?

A Well, we knew at that time that he had some ammunition that he went and bought.

Q You knew at the time that Mathews had some ammunition that he had bought?

A Yes.

Q Had you run your ballistics test at that time?

A Yes.

Q Did you know that the ammunition that Mathews [280] bought is the ammunition that killed these people?

A I don't know if we—I don't know if we ever linked that? I know the ammunition that was used, was all the same. I am not trying to be deceptive with you. I don't know if the actual ammunition that was bought was the actual ammunition that was used? It was the same type of ammunition.

Q Did you tell this jury that the ammunition that Mathews bought was the ammunition that killed those people at Taco Bell?

A I may have referred to it as the same type of ammunition?

Q Well, let's see what you referred—"Who bought the ammunition? The Defendant did." When you told the jury

that, were you saying that he bought the ammunition but I don't think he used it?

A No, I'm saying—I think what I was referring to there is that he did—there was evidence in the record that he did purchase ammunition, okay? And the ammunition that was recovered at the crime scene were all shot in the same weapon. I don't know that that exact box of ammunition was the same ammunition that was used in the gun down there?

Q It was the same type, wasn't it?

A Same type but that doesn't mean—

[281] Q Same company, wasn't it?

A But it doesn't mean that—

Q Federal—was it Federal ammunition, is that right?

A I don't recall now what it was.

Q Did you introduce proof to show the consistency between them?

A Yes.

Q On top of that, your investigators went out and found this man named Hassett (phonetic), correct? Hippy Dude? Remember that?

A I don't know the man's name? All I know is that it was Hippy Dude?

Q Went out and found him?

A Interviewed him.

Q And he said this is nonsense. I didn't sell Housler anything, he didn't come over here. This is nonsense, didn't he say that?

GENERAL RADFORD: Objection—

THE COURT: Sustained.

MR. TERRY: What did he tell you?

GENERAL RADFORD: Objection.

THE COURT: Sustained.

THE WITNESS: I don't recall what he said.

THE COURT: The objection is sustained.

[282] Next question please.

Q (By Mr. Terry) Let me ask you this, General Carney. When you came in on November 7th and confronted Mr. Housler and his Attorney, McMillan, didn't you have a list of reasons for why the agreement had been breached?

A Yes.

Q Wasn't one of the reasons that you had checked out this ammunition story and it didn't fly?

A That was one of several, yes.

Q So this ammunition story is nonsense, isn't it? It's not true? Isn't that right?

A If you believe that witness.

Q You believed it enough to use it as part of your breach of the agreement—

A The primary reason, Mr. Terry, that the breach of the agreement was that he implicated Sulyn Ulangca and he failed to cooperate with us. Those were the primary reasons.

Q Are those the reasons that you indicted him?

A I indicted him because he had breached that agreement. And he knew the terms of the contract, he signed it. His Attorney knew the terms of the contract.

Q So the penalty for breaching an agreement with the District Attorney in Montgomery County is indictment for first-degree murder, is that right?

[283] A He breached the agreement, he knew the terms of the contract and he placed himself down there as a look out.

Q So why didn't you say you're a jerk, get out of here, you're wasting my time? Why did you go over there and indict him for first-degree murder?

A Because I felt like at the time that there was sufficient probable cause to indict—to present the case to the grand jury and have them review it.

Q The only thing you gave that grand jury was this statement, isn't that true?

A I don't remember what all—I know the statement was read. I don't know what other evidence—I don't remember what other evidence.

Q Can you remember any other evidence that was presented to that grand jury other than this statement?

A I don't remember today.

Q And you went over there before that grand jury though, you had checked out this ammunition story and it didn't check out? Is that right?

A To be honest with you, I don't remember when the man was interviewed? If it was before or after the grand jury? I don't remember.

Q Would you agree with that—I know you have seen this statement several times. But would agree with me that there is a lot in here about Sulyn?

[284] A Yes.

Q It talks about Sulyn says don't go and then when they get there, Sulyn says this is a mistake? A lot of Sulyn stuff?

A Yes.

Q And your investigators went to North Carolina and she said that's all nonsense. I wasn't there, I didn't say those things? Is that right?

A Yes.

Q And you said bring her here? I want to talk to her. And when she told you that, you believed her?

A Yes.

Q And you knew that every reference to Sulyn in this statement is false? You had reached that conclusion?

A I had reached it independently and collectively with General Garrett and Bush and then when Mr. Housler said that he had implicated her, then it was over.

Q What was over?

A As far as her involvement.

Q You knew when you went before the Montgomery County grand jury that the references to Sulyn Ulangca were false, is that correct?

A Yes.

Q Did you tell the grand jury that those statements were false?

[285] A I didn't tell the grand jury anything.

Q Did Agent Puckett or Agent Charvis tell the grand jury that we have checked out portions of this statement and it is false?

A I don't recall that. I am sure that that probably did occur.

Q You think so?

A Yes.

Q What portions of this statement do you recall that Agent Puckett or Detective Charvis telling the grand jury was false?

A I can't recall independently right now, what they were.

Q Did you ever take this statement and run it on a time line? Say Housler says that he came back to the trailer at 10:30? Housler says that he was there at dusk? Then a half hour later, they did this, and an hour later, they did this? And figure out when the murders occurred, according to this statement? You never did that?

A I don't recall doing that personally.

Q Do you know if anybody did that?

A I don't know.

Q You would agree that the murders in this case probably occurred after 2:30 a.m. though, wouldn't you?

[286] A Yes, based upon other people's testimony. Of what they heard and what they saw.

THE COURT: Would Counsel approach?

(WHEREUPON, a side bar conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

THE COURT: I need to for planning purposes, I need to know if you are an hour away, ten minutes away, two hours away, do you know?

MR. TERRY: I think it is more into an hour.

THE COURT: Okay, the reason that I am asking is because I think the jury has had it. I did not want to break during Mr. Carney's testimony. I wanted him to finish so he could devote some time to his mother, but I just think the jury has—I have been watching them, and they are just exhausted.

MR. TERRY: If there is any accommodation that I can make in this situation, I certainly will. I mean I—if he can't get here in the morning, we'll resume with someone else and then go back to him. If we do Puckett and Charvis and don't need this, I'll let you know. That may be the way to go.

[287] GENERAL RADFORD: I certainly appreciate the Court's position.

(WHEREUPON, end of side bar conference.)

THE COURT: Ladies and gentlemen, given the hour, we are going to break for the evening. I want to remind you now that the admonitions, of course, still apply. You are not to talk about the case among yourselves or with anyone else. Don't form or express any opinion about the case. Don't read, view or listen to any news reports about the case. Please don't permit yourself to be influenced by anyone or anything and we'll see you back here in the morning. Our routine will be the same. Turn your pads face down and have a good night.

(WHEREUPON, the jury was excused from open Court, and the following proceedings had:)

THE COURT: Mr. Carney, I had hoped to finish your testimony, but given what the lawyers say, it didn't look like it could be done. So what we are going to do is try to conclude your examination sometime tomorrow when it is convenient for you. Why don't you confer with Mr. Radford

about that? Mr. Radford, you need to be prepared to go forward with other witnesses in the event that Mr. Carney is not going to be the first one back in the morning?

APPENDIX H - Excerpts, D.A. Carney, *Housler* Trial Testimony

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

Case No. 39217

STATE OF TENNESSEE,

Appellee,

versus

DAVID HOUSLER,

Appellant.

TRANSCRIPT OF THE EVIDENCE
November 15th, 1997 Volume
Part A of A & B

---

[41] Q Yes, where?

A Oh, "for the first time at Kevin Tween's trailer in Oak Grove, Kentucky, approximately a week prior to the murders at Taco Bell."

Q What is the next line?

A "I remember this being on a Friday night."

Q Okay, the Friday night before the Taco Bell murders was January 21, 1994, correct, Mr. Carney?

A I believe that's correct.

Q Where was Courtney Mathews on January 21, 1994?

A I don't—I don't recall where he was? I know where he was the night of the—if you are referring to him being at work in the 9:11, 9:17, that was the night of the incident? Is that what you are asking?

Q No, sir, I am asking you where was Courtney Mathews on Friday, January 21, 1994?

A At what time?

Q From—during the time that is referenced in the statement that you took to the grand jury and indicted a man for first-degree murder? During this time, 9 o'clock, 9:00 p.m., Mathews came in at 9:00 p.m., it says?

A I can't answer that, because I don't know where he was? You are asking me where Courtney Mathews was on January 21, 1994, a week prior to the murders?

[42] Q Yes, sir.

A As I sit here today, I can't recall where he was.

Q So you never checked that out?

A It probably was checked out, Mr. Terry, but I am answering your question, I don't know where he was?

Q Who checked it out?

A Probably the investigators?

Q Do you know where Courtney Mathews was on Saturday, January 22, 1994?

A As I sit here today, I can't give you that answer. I don't know the answer to that.

Q You prosecuted Courtney Mathews, you tried the case, you indicted this man for first-degree murder and you have been investigating this case since January 29th, 1994, and you can't tell this jury where Courtney Mathews was on the night of the so-called trailer party? Is that right? Is that your testimony?

A What my testimony would be is that we relied upon the witnesses that we had that said he was at the trailer. You are asking me personally did I know where he was? And I told you I couldn't remember that? I don't know that?

Q Let me just move on, I can do this this way. Aren't you aware that Courtney Mathews' time records [43] from the Taco Bell show that Courtney Mathews was at work at Taco Bell until 3:14 a.m. on Friday, January 21, until 3:16 a.m. on Saturday, January 22? Don't you know that?

A I don't remember? I am not disputing that there are records out there? I know that there are some records that came up during that trial and I can't remember what the dates were and the times were, but as I sit here today, Mr. Terry, I can't recall? I can't recall that?

Q Assume that it is true, what impact would that have on this March 21 statement, the acorn, where he says that I was at a party on the 21st with Courtney, on Friday, the 21st, I was at a party with Courtney and then on the October statement, when he says what you have just read, what impact does that have when, in fact, Courtney Mathews was working until 3:14 and 3:16 in the morning?

GENERAL RADFORD: Objection, calls for a conclusion.

THE COURT: Overruled.

MR. TERRY: What impact does that have on the statement?

THE WITNESS: The impact was that Courtney Mathews couldn't have been at that trailer at that time.

MR. TERRY: Thank you, no more questions.

APPENDIX I - *Housler* Statement, Excerpt Puckett Testimony *Housler* Trial

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

[Filed 8-14-02]

CASE NO. 39217

STATE OF TENNESSEE,

Appellee,

versus

DAVID G. HOUSLER,

Appellant.

** TRANSCRIPT OF THE EVIDENCE **
November 15th, 1997 Volume
Part A of A & B

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[90] Q. Explain what the procedure was.

A. It was—it was pretty much still a meeting organized or initiated by the District Attorney's Office. No determination had been used about using Mr. Housler as a witness, not a witness. We were trying to get to the truth of the matter so that we would have all the details and all the people that were involved. Mr. Housler would give us a detail, he would confer with his attorney, he would give us a detail, he would confer with his attorney. Our attorneys would talk among themselves and that's the way it went most of the day.

Q. Now, after this, are you familiar with a proffer agreement?

A. The proffer agreement I believe was entered into the day before, on the 19th.

Q. The proffer agreement had already been entered into?

A. I think that's correct.

Q. And this was on the 20th?

A. Yes, sir.

Q. Now, did you then take a written statement from Mr. Housler?

A. It was determined amongst the attorneys present, his and ours, that that would probably be the best way to record or document a statement to get the full [91] details of what Mr. Housler was telling us, that's correct.

GENERAL RADFORD: Your Honor, may I tender this to the witness?

THE COURT: Yes.

(WHEREUPON, the witness is furnished with above-mentioned document.)

Q. (by General Radford) Mr. Puckett, do you recognize that item?

A. This is the signed statement by David Housler and reduced to a typed copy.

Q. Now, before reading that, did you read the signed statement word-for-word, line-by-line, and compare it to that copy?

A. Yes, I did.

Q. Is that a correct transcription of that signed statement?

A. As far as I can tell and I have read it many times, I sure hope it is.

Q. You made every effort?

A. I made every effort.

Q. And you have supplied a copy of your written, hand-written statement to Defense counsel for comparison purposes also?

A. Yes, sir, I did.

GENERAL RADFORD: Your Honor, I would move [92] that into evidence at this time?

THE COURT: Received and marked 87.

(WHEREUPON, Trial Exhibit Number 87 was marked for identification and received into evidence.)

MR. TERRY: Your Honor, may we approach the bench?

THE COURT: Sure.

(WHEREUPON, a side bar conference was had between Court and Counsel, the same being within the presence but outside the hearing of the jury as follows:)

MR. TERRY: I object to the admission of the statement in this trial on the basis that the statement is substantially false and that the State of Tennessee's representatives know that it is substantially false and it amounts to offering perjury as evidence.

GENERAL RADFORD: The agent has testified that that is what Mr. Housler told him. He is not vouching that it is all true or that it is all false, or any of it is true or any of it is false? He is just testifying truthfully as to it—it is not perjury on his part.

THE COURT: Regarding the admissibility question, the document is admissible with the proper foundation, that it is a statement that Mr. Housler [93] made and whether it is true or not is a matter for the jury to determine.

MR. TERRY: If I might make one more objection for the record.

I move the Court to redact all portions of this statement which have been acknowledged by the District Attorney to be false.

GENERAL RADFORD: If we do, will Mr. Terry—no sir, I won't agree to that. The statement was given and I thought about it—but no sir, I wouldn't agree to that. The entire statement was given and we feel that it was admissible as to what he told.

THE COURT: Well—the truth of the statement is a matter to be determined by the jury. It is true that Mr. Carney has indicated that he does not believe that all of it is true. It is also true that he identified certain portions of it that he believes is not true, all of which, Mr. Terry, you will be able to point out through your examination of this and any other witness that testifies about the statement. So your motion is respectfully denied.

(WHEREUPON, end of side bar conference.)

THE COURT: You may proceed.

GENERAL RADFORD: Go ahead, and would you put a copy up please?

[94] THE COURT: Have the copies been distributed?

GENERAL RADFORD: Yes, sir, and then I would ask that they be distributed also?

(WHEREUPON, the copies were passed to the jury for their inspection.)

GENERAL RADFORD: Go ahead, Mr. Puckett, now please sir and read the statement.

THE WITNESS: "I met Courtney Mathews for the first time at Kevin Tween's trailer in Oak Grove, Kentucky, approximately a week prior to the murders at Taco Bell. I remember this being on a Friday night. I believe I was AWOL from the Army at that time. I did not routinely live at

this trailer in Oak Grove. We all met to party there. The name of the trailer park is Hillcrest. I arrived at the party at approximately 6:00 p.m. Sulyn Ulangca was with me that night. Courtney Mathews and an unknown black male in an Oakland Raider's jacket arrived at about 9:00 p.m. I don't know how they got there. I first saw Kendra Corley about thirty minutes later. I had never met Courtney Mathews prior to this night.

Charlie Brown and myself were talking about him, Brown, faking his death for insurance money. While Brown and I were talking, Mathews came to where we were sitting and we all started talking about crimes we had [95] committed. Brown was talking about a Corvette he had stolen and I told about the robbery we had [95] committed at Grandpa's. Mathews was listening at first and about ten minutes into the conversation, he brought up the idea of robbing the place where he worked. Mathews said where he worked after they closed, that there was hardly anyone left. Brown asked how would you get in and Mathews said I can get in because I work there. I then asked him how would he do the robbery? Mathews said he would go in real quick and leave no witnesses. I asked Mathews what he meant and Mathews said he would 187 them which means to me that he was going to kill them. I told Mathews that he was full of shit and that he was a bitch and would not do that. Brown said he didn't think Mathews had the balls to do it and I told Mathews that if he would do it, that I would go with him. We dropped the subject until Kevin Tween walked by and I think I asked Tween if he knew about Mathews wanting to rob where he worked? Tween stated he had not heard anything about it. Tween said whatever, whenever I took that to mean he was in on the deal. I had known Red, Kevin Tween, for about four months prior to this. Tween and I had been involved in a couple of fights together, so I trusted Tween. Tween walked off at this point in the conversation. Mathews stated that he [96] wanted to do the robbery on a weekend. In a few

minutes, Melanie Darwish, who is Tween's girlfriend came over to me and said she was in and Bonnie and Clyde ride again. Darwish was referring to me and her because she had helped me on the Grandpa's robbery. During the course of the party, someone said let's go get a taco and an unknown female said let's go get Courtney, he works there. That's how I knew where Mathews was employed. Either Tween or Darwish asked Kendra Corley if she would help in the robbery and she said she was down, meaning she would help.

Dana Ulangca, Ed Werth, George Tate, Hector Ortiz, Dan Morgan, Sgt. Jerry Johnson, Brenda—last name unknown, white female, Kiki, who I think is Christopher Nunn, Christina—white female, last name unknown, black male, Kemo, Mike Pellino and James Bowen were at the party. I don't believe any of these people participate in the conversation about the robbery. I think Sulyn Ulangca may have overheard parts of the conversation. I know that Tween, Werth, Kemo, were gang-related. Most of them were Cryps.

Mathews had an 8 ball shirt on which indicated that he was affiliated with Folk and Cryp alliance. I never formally joined a gang. I was beat in but never really joined a gang. Around 11:00 or 12:00, Mathews [97] left the party. I assume Corley left also. I had no other conversations that night regarding the Taco Bell robbery. One day during that week, I remember Tween and I talked about Mathews and whether or not he would actually do the robbery? I do remember at the party on that Friday night, I did see Mathews with a large blue gun stuffed in his waist line. I don't know what type of gun it was. It appeared to be a .9 millimeter or .45 cal.

On Saturday night before the Super Bowl, I came to the trailer and Mathews, Kendra Corley, Tween, Darwish, Dana Ulangca were there when Sulyn and I arrived. I don't remember what time it was but it was dark or almost—

THE COURT: Excuse me, reread please.

THE WITNESS: "I came to the trailer and Mathews, Kendra Corley, Tween, Darwish, Dana Ulangca were there when Sulyn and I arrived. I don't remember what time it was but it was dark or almost dark."

GENERAL RADFORD: I am sorry, Your Honor. That was the corrected copy and that was—

THE COURT: Would you hand me up a copy—

(WHEREUPON, the Court is furnished with above-requested document.)

THE COURT: Proceed.

[98] THE WITNESS: "I don't remember what time it was, but it was dark or almost dark. I don't remember seeing any other cars around the trailer other than Darwish's red Tempo. I was driving my white Tracer. When I came into the trailer, Tween said tonight is the night. I said what do you mean? And he said Taco Bell. I asked him what do you want me to do? Tween said I need you to get some shotgun shells and other ammunition. I knew he wanted .9 millimeter because that's what everybody carried. Mathews, Darwish, Dana, Sulyn and Kendra Corley were all in the same room when Tween and I were discussing the ammo. I assume they all heard this conversation. Tween took me back to the bedroom and pointed at a shotgun laying on the bed and said that's what we need the shotgun shell for. I don't remember the gage or the word slug being used.

I had gotten ammunition for people before and they knew I knew where to get it. The only other gun I saw at the point was the gun Tween had stuck in his pants. This was some type of blue automatic pistol. Sulyn and I talked in the kitchen and she said she didn't want me to go and I told her I had already said I would go and I had to go. I soon left the trailer and went over to East Fork Street where the guy I knew had the ammo. I only knew him as Hippie Dude, a

white male [99] twenty eight years old with a pony tail. I don't know the address but I will take you there. Hippie Dude drives an older model dark blue Nova. I bought a box of shotgun shells, a single sleeve in a green box. I also bought a box of .9 millimeter shells also in a green box. I was not told how many to buy, I just bought what I could afford. This came out of my own money. I don't remember how much I paid. I had to wait thirty minutes to an hour for him to get the shells and get back. There were other people at this house, but I don't know their names. Jennifer Ellis probably knows Hippie Dude and his friends.

When I got back to the house, only Darwish's red Tempo was there. Before I went to Hippie Dude's house, I drove by the Showboat Arcade to see if Hippie Dude was there? When I didn't see his car, I drove on to his house.

When I went back in the trailer, I remember some sort of local news program was going off. Tween, Darwish, Mathews, Sulyn and Dana were all there. Dana was asleep and Kendra Corley had left. I set the shells on the table and got a beer. Sulyn approached me again about not going to the robbery. I told her I would talk to them. I told her that just to get her off my back. Tween or Mathews started talking about the robbery [100] and Sulyn told them that she would not let me go. Tween said don't be a little bitch about it, don't let her tell you what to do. That's when everybody started hyping me up, calling me a little bitch and said I was pussy-whipped. We sat around talking for an hour or two, until I finally said okay, I'll go. There was some type of planning about who was going to do what during the robbery but Sulyn and I were arguing and I didn't hear all the details.

We got ready to leave and Darwish drove the red Tempo and I drove my white Tracer. Mathews sat beside me, Tween sat behind Mathews and Sulyn sat behind me. Darwish left by herself. It was my understanding that she was going to pick up Mathews and Tween after the robbery. I never saw the

shotgun after I got back to the trailer. The only gun I saw was Tween's automatic pistol. The shotgun that I had seen earlier was a pump. I think a Mossberg about twenty-four inches long? But I didn't see anyone with that gun after I arrived back at the trailer.

When we all left the trailer, Mathews seemed to have something similar to the size of a shotgun stuffed under his coat. I don't know if it was the same gun or not or whether it was even a gun. I do remember that as we were leaving, Tween picked up the shotgun shells and stuck them in a jacket pocket hanging [101] on a coat rack. I don't know whose coat the shells were placed into. As far as I know, the box of .9 millimeter were still sitting on the kitchen table when we left. I don't know if anyone took any of the rounds out or not? When we left the trailer, Tween was wearing a big dark blue hooded Adidas jacket, black and white shell toe Adidas tennis shoes, blue jeans and black t-shirt with a clown on it. Mathews was wearing a black cloth knee-length jacket, black shoes and some type of blue pants. Darwish—I don't remember what she was wearing. Sulyn had a multi-colored striped shirt, blue jeans, black Fila's and a brown cloth coat. I don't recall if anyone was wearing a hat. I was wearing a Genco denim jacket, blue-hooded sweat shirt, baggy blue jeans and gold Nike tennis shoes. I was also wearing black Army-issue gloves. Tween was wearing the green Army insets out of my gloves on his hands. I don't recall if Mathews was wearing gloves or not?

As we were leaving the trailer, we talked about needing beer and cigarettes and we stopped at the Minit Mart by 101st Parkway or 41-A. Tween and I went in the store and we bought two 40 ounce Olde English beer and a pack of Marlboro or Newports. We stopped there because he would sell me beer underage. The cashier was a white male, thin-build usually worked the third [102] shift. I think he had a little moustache. I paid for my beer and cigarettes with money

I got from Sulyn. Tween either bought or stole a soda of some kind. He had it in his hand when we left the store. When we pulled out of the Minit Mart, I remember the next traffic light was red and I stopped. That's when Tween said we have to get—we pulled out of the Minit Mart. I remember the next traffic light was red and I stopped. That's when Mathews said we have to get in and get out quick. As we went up the street, Tween said something to the effect, we have to buck those mother fuckers. That means to kill them. Mathews said oh yeah, like we were going to a party. At that point, everyone in the car knew we were going down there to rob the Taco Bell and kill everybody. Mathews told Tween that when we got down there, you get out and go by the back door. Tween said that's good because I have to piss anyway.

We keep driving and there is very little traffic. Tween said are we going to get the register or the safe? Mathews said, I've got the safe covered. I then asked Mathews where are the guns? Mathews said my bitch took care of that. I took his bitch to mean Kendra Corley. Mathews said the guns would be around or in a trash can. He didn't get to finish the sentence because Sulyn interrupted. Sulyn yelled y'all are a bunch of dumb [103] mother fuckers and slapped me in the back of the head. Sulyn said this is more trouble than it's worth. I had assumed that I would go into the Taco Bell with Mathews and Tween up until the point that Sulyn started bitching at me. At that point, I decided not to go in. I had a Star .9 millimeter pistol on the front seat that I was going to carry in with me. As we were coming down 41-A, we turned into Two Rivers Mall entrance like we were headed into the U.S. Factory entrance. We cut across the mall parking lot and I pulled up to the drive up window of the Taco Bell. Mathews said pull up to the side window and let him out. Mathews and Tween were both fidgeting and like hyped up in the car.

Mathews gets out of the car, walks around to the front of the car, taps on the drive-thru window while Tween gets out

of the back seat and gets in the front seat. I saw a heavy-set white female with brown hair come to the drive-up window. The female said what's up and Mathews said I need to get in and get either my wallet or driver's—I am not sure which. The female said hold on and I started backing the car up to the right side of the dumpsters in the parking lot.

Tween told me to sit outside with the motor running and if anyone pulled up to honk the horn twice [104] and leave. During this time, Tween and I saw Darwish's car sitting in the mall parking lot. It was setting at the corner of Two Rivers Mall closest to the Red River and 41-A. As Tween was getting out, he said she's there. I will take you to the parking lot and show you the location of all the vehicles. I let Tween out and he went behind the dumpsters. I then pulled around to the main double doors and sat parallel to the double doors across the parking slot with my headlights facing McDonald's. At this point, Sulyn got in the front seat with me. Sulyn said this is so dumb. I can't believe we are here. I kept the motor running but cut the lights out because it would be too obvious. Sulyn was really mad at this point. As we parked by the double doors, I saw Mathews and the white heavy-set female walk across from the side door toward the counter area towards the bathrooms. During the time we sat there, I didn't see any cars come through the parking lot. I don't remember if any cars were in the parking lot or not. I do know that my car drips oil and if you have photos of the parking lot, you might see the puddle as to the location of my car.

After about twenty minutes, we heard a loud pop from the other side of the building. In about fifteen seconds, we heard at least ten or fifteen other pops [105] and they all sounded different. Not like a car backfiring. It took two or three minutes for the pops to stop. When the pops stopped, I heard a loud bang, and within seconds, I saw Tween running out from behind the Taco Bell and toward the dumpsters. Sulyn

was crying at this point. I think the bang I heard sounded like a metal door being swung open. Within seconds of Tween running, I heard the same type bang and saw a figure running in the same direction of Tween. I was already putting the car in gear and getting out of there. I pulled onto Riverside Drive, turned left on 41-A and headed up across the bridge. I always thought Melanie Darwish was the getaway car and I was the lookout.

As I was turning onto 41-A, I almost rear-ended a Chevelle older model primer car with partial license number DFN on a white plate that appeared to be a Tennessee tag. It had four circle old-fashioned tail lights and no bumper. I do know that Tween and Mathews were going in the direction of Darwish's car and I assumed she was going to pick them up.

I pulled up 41-A hill and pulled into the Dingo boot parking lot. I was sitting right in front of the boot place and about five minutes later, Darwish pulled up with Mathews in the back seat and Tween in the passenger seat. I don't remember when we discussed where to meet, [106] but I know we were supposed to meet there. Tween and Mathews got out of Darwish's car and opened the trunk. Mathews had the shotgun and put that in the trunk. I saw Tween throw a pistol in the trunk. I also saw Mathews toss a Taco Bell sack in the trunk. Tween came around to my window and I asked him what happened? Tween seemed hyped up and said he, Mathews, took them in the back and flipped out. Tween also said that he shot but didn't hit anything. As Tween was going back to his car, he told me to go, go, go. At that point, I pulled out and we drove towards Oak Grove. We ran side-by-side until I turned off on Jack Miller Boulevard and they continued on straight. It took me about twenty minutes to get to the trailer. Sulyn told me she hated me and called me a bastard and I said I was sorry.

After we arrived at the trailer, Tween and Drawish arrived thirty minutes later without Mathews. I asked Tween and

Darwish where my cut of the money was and Tween said Mathews would be over later with the money. Earlier that day at the trailer, we decided the split would be thirty-five for Mathews, thirty-five percent for Tween and thirty percent for me. Mathews never showed up and I never saw or spoke to him again until we saw each other in jail. I talked to Sulyn for a long time because she was hysterical. I would [107] walk by Tween and Darwish who were sitting on the couch and I asked where the fuck is he? Tween said, he'll be here.

I came back a few minutes later, and I asked Tween what happened and he said Mathews shot one of them in the head and we G'd them up. That is gang language for we shot them gangster style which is to make sure they were dead.

I talked to Sulyn at this point and we agreed that we would not say anything to anybody. I left after about an hour or so and I told Tween to wait there for my money. At one point earlier in the evening, I remember Mathews said we could expect to get about fifteen hundred dollars so my part would have been about five hundred dollars. When I left there, I went to Jennifer Ellis' parents' house off 101st by-pass. I will take you to her house. I stayed at Jennifer's house until about 6:00 p.m. Sunday. I didn't tell Jennifer what I had been involved in. I went back to the trailer and asked Tween if he had my money or had talked to Mathews and he said he hadn't.

I remember that when Tween and Darwish arrived at the trailer, that Darwish said she had dropped Mathews off at the barracks. I never found out what happened to the guns from the murders. I assume they were thrown [108] away?

I know that Tween went to California about a week after the murders and came back within a few days. I had quit hanging around Tween and Hector Ortiz told me that Tween was going to California. I went to the motel that Tween and Darwish were staying at. I think it was Winner's Circle or

Edge of Town. I thought at the time Tween and Darwish were leaving for good. We didn't talk about the Taco Bell murders at all. I have not spoken or seen Tween or Darwish since before they left for California.

I purchased my gun from Joey Carman in Ratcliffe, Kentucky. His phone number is 502-351-8577 or 3522625. I left my car on the road that Jennifer Ellis lives on. I left the car because I thought it could be linked to the Taco Bell homicides. It is my understanding that it was impounded by the police department. The car was registered to me. I purchased the car from Bud's Auto Sales. On 3/10/94 I was arrested for AWOL and armed robbery and placed in Montgomery County Jail. I had been in jail for about two weeks when I saw Mathews in the holding cell downstairs. Mathews told me not to rat, that this is so fucked up. Mathews said if you rat, I will kill every Housler I know. One of my lawyer's clients was there with me and I believe he [109] heard that statement.

I have not talked or seen Kendra Corley since on the night before the Taco Bell killings.

Regarding my Star .9 millimeter pistol, I recall taking it to Ratcliffe, Kentucky, within a couple of weeks of the homicide. I gave the gun to Jeremy Thompson to hold. Thompson has since been arrested with the gun and I believe it is still in the possession of the Ratcliffe Police Department. While we were on the way to the Taco Bell on the night of the homicides I recall Tween kept working the action on his pistol. I also recall Tween's tennis shoes being new and when I saw Tween the next day, he had a red stain that I assumed to be blood on the left side of his shoe.

I never saw anyone discard or change clothes on the night of the Taco Bell homicides. I also recall that someone told me that the empty .9 millimeter box was thrown under the trailer in Oak Grove.

This statement was hand-written by SA Jeff Puckett of the T.B.I. and adopted by David Housler and witnessed by Detective Alan Charvis."

THE COURT: If you would pass all your copies to the end of the row?

(JURORS COMPLY WITH REQUEST.)

THE COURT: Mr. Radford?

APPENDIX J – Chart Regarding *Housler* Statement

SOME FALSE COMPONENTS OF HOUSLER STATEMENT

HOUSLER STATEMENT	THE TRUTH	PROOF
1. Met Mathews Friday night week prior to murders at trailer party	Mathews at work both Fridays and both Saturdays from January 20 until murders	Mathews' Time Records (Ex 14) Pet. App. A, p. 12a Pet. App. K, pp. 178a-179a Pet. App. H, pp. 123a-125a Pet. App. K, pp. 178a-180a
2. Sulyn Ulangca w/Housler when he met Mathews at Oak Grove trailer party	Mathews at work Sulyn never with Housler and Mathews	Mathews' Time Records (Ex 14) Pet. App. G, pp. 119a, 120a Pet. App. K, pp. 178a-180a Pet. App. D, pp. 45a-47a
3. Kendra Corley was with Mathews at the trailer party on the Friday before Taco Bell	Kendra Corley at work	Mathews' Time Records (Ex 14) Corley testimony and work records; Pet. App. A, p. 12a Pet. App. H, pp. 123a-125a Pet. App. D, pp. 56a-58a
4. Charlie Brown and Housler were talking about committing crimes. Mathews came up and they all started	Never happened. Charlie Brown and Housler concocted the story while incarcerated to obtain leniency.	Affidavit of Charlie Brown;

HOUSLER STATEMENT	THE TRUTH	PROOF
"talking about crimes we had committed"		
5. Mathews "brought up the idea of robbing the place where he worked"	Mathews began working at Taco Bell on January 20, there were only two Fridays and two Saturdays from January 20 until the murders. Mathews was at work on all of those days.	Mathews' Time Records (Ex 14) Pet. App. H, pp. 123a-125a Pet. App. A, p. 12a
6. Housler and Darwish at trailer on 1/21/94, talk about "Bonnie and Clyde" & Grandpa's robbery	Impossible. Grandpa's robbery did not occur until 1/23/94.	Pet. App. A, p. 12a Pet. App. D, pp. 49a-52a
7. "Either Tween or Darwish asked Kendra Corley if she would help in the robbery and she said she was in" [referring to trailer party conversation]	Kendra Corley was at work and could not have been a participant in this conversation.	Pet. App. D, pp. 56a-58a
8. "Sulyn Ulangca may have overheard parts of that conversation."	Sulyn Ulangca never overheard any conversation between David Housler and Courtney Mathews.	Pet. App. G, p. 119a Pet. App. D, pp. 45a-47a

HOUSLER STATEMENT	THE TRUTH	PROOF
9. Tween told Housler to go get ammunition. Housler went to find Hippie Dude and bought a box of shotgun shells and 9mm shells. It took about 30min. - 1 hr.	Hippie Dude never heard of Housler and never sold him anything.TBI Agents located Hippie Dude in Michigan and he verified that he never heard of Housler and never sold him anything.	Pet. App. D, p. 55a Pet. App. D, p. 103a Pet. App. K, p. 168a' Pet. App. A, p. 12a
10. When Housler returned to the Oak Grove trailer, Tween, Darwish, Mathews, Sulyn and Dana were all there.	Mathews was at work at Taco Bell. None of the other people were there, and neither was Housler.	Mathews' Time Records (Ex 14) Pet. App. K, pp. 148a, 154a-163a Pet. App. D, pp. 45a-47a, 54a-56a, 60a-61a Pet. App. G, pp. 113a, 114a
11. Mathews, Housler, Tween & Sulyn left the trailer for Taco Bell in Housler's car.	Mathews went to Taco Bell from Ryder Avenue at approximately 11:00PM in his blue Pontiac. None of the others ever went to Taco Bell that night.	Pet. App. F, pp. 91a-92a Pet. App. G, pp. 95a, 119a, 120a Pet. App. C, pp. 37a-43a Pet. App. K, pp. 151a, 152a, 169a
12. On the way to Taco Bell, Housler, Mathews, Tween & Ulangca stopped at	Never happened.	Mathews' Time Records (Ex 14) Pet. App. K, p. 170a Pet. App. K, pp. 151a, 152a Pet. App. A, p. 12a

HOUSLER STATEMENT	THE TRUTH	PROOF
Minit Mart and bought cigarettes and beer.		
13. Housler asked Mathews "Where are the guns?" Mathews said "my bitch took care of that"—meaning Kendra Corley.	Never happened. Kendra Corley at work. Mathews seen leaving Ryder Avenue with the guns by his two roommates.	Pet. App. K, p. 155a Pet. App. C, pp. 37a-43a
14. Sulyn and Housler sat in a car outside Taco Bell while Tween and Mathews went in and killed four victims.	Never happened. Sulyn took a lie detector test, and was extensively interviewed by police agents who have testified that she was truthful.	Pet. App. D, pp. 45a-48a
15. Tween and Mathews went into Taco Bell and killed four people in 20 min. And then ran out the back door.	Mathews went into Taco Bell by himself, was inside for hours, and killed the victims by himself. Tween had an alibi.	Pet. App. K, pp. 148a-166a
16. Darwish and Tween took Mathews back to the barracks after the Taco Bell murders.	Mathews left Taco Bell after killing the victims by himself, drove around discarding evidence, and returned home to Ryder Avenue at approximately 5:00AM	Pet. App. K, pp. 155a-156a

HOUSLER STATEMENT	THE TRUTH	PROOF
17. Sulyn got hysterical, angry, called Housler "a bastard" and said he was "sorry" Sulyn and Housler returned to the trailer in Oak Grove.	Sulyn and Housler were not at Taco Bell and Sulyn never said any of the statements attributed to her.	Pet. App. D, pp. 45a-48a
18. Housler had a 9mm pistol which he took to Radcliff, KY and gave to Jeremy Thompson.	Not true.	Pet. App. F, pp. 92a-93a

APPENDIX K - Excerpts, ADA Garrett, *Housler* Trial Testimony

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

[Filed 8-14-02]

CASE NO. 39217

STATE OF TENNESSEE,

Appellee,

versus

DAVID G. HOUSLER,

Appellant.

** TRANSCRIPT OF THE EVIDENCE **
November 17th, 1997 Volume

[78] scene with Detectives?

A Yes, sir, he was to cooperate fully. There was an agreement and as far as I know, he did, in fact, return with. a team of detectives and gave them additional information—

MR. TERRY: Your Honor, unless this is from personal observation, we object.

THE COURT: Sustained. Answer stricken, question stricken. Lay a foundation of personal knowledge please. Go ahead.

Q. (By General Radford) Did you see a map and some materials from that meeting?

A Yes, sir.

GENERAL RADFORD: That's all.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. TERRY:

Q Mr. Garrett, who do you work for today?
A I word for General Gus Radford.
Q This man right here?
A Yes, sir.
Q He's your boss, isn't he? Have you talked to anyone about this trial since the trial began?
A Met with. General Radford on Veteran's Day.
Q. On Veteran's Day? The day before the trial began?
[79] A Yes.
Q So it would be on November 11th, you met with General Radford?
A Yes, sir.
Q Did you discuss this trial at that time?
A Pretty much listened to General Radford.
Q Since the 11th, have you met with anybody regarding this trial?
A No, sir.
Q How long have you been a lawyer?
Since October of 1977.
Q. How long have you been a prosecutor?
A Since August of 1982.
Q Does a lawyer have an obligation to be truthful in a courtroom?
A Yes.
Q Is there any qualification on that obligation?
A I know of none.
Q Does a prosecutor have an obligation to find the truth?
A Make his best efforts, yes sir.
Q Does the prosecutor's obligation to discover the truth override any obligation he has to obtain a conviction?
A Yes, sir.
[80] Q Is there any obligation more important to a

prosecutor than to attempt to find out what the truth is?

A No sir.

Q Is there any qualification on that obligation?

A No, sir.

Q That's an absolute obligation?

A Yes, sir.

Q Did you stand before the Courtney Mathews jury in closing argument and talk about Michelle Antaya (phonetic)?

A Yes, sir.

Q Who is Michelle Antaya?

A She was a witness in the Courtney Mathews trial.

Q Okay, and did you put Ms. Antaya on the witness stand in the Courtney Mathews trial?

A Yes, sir, I did.

Q For what purpose?

A Put her on the stand and she testified that she—

GENERAL RADFORD: Objection, hearsay.

THE COURT: Sustained as to the statement by the witness that she testified but the question is proper, it was answered properly.

Q (By Mr. Terry) What purpose did you put Ms. Antaya on the witness stand?

A To establish that Courtney Mathews was down at [81] the Taco Bell Restaurant, my best recollection around 11:30, 11:30 to 12:00 midnight.

Q That Courtney Mathews on the night of the murder, was at the Taco Bell Restaurant about 11:30, correct?

A Yes, sir.

Q Two hours and fifteen minutes after he punched out, approximately?

A About that, yes sir.

Q Did you believe—

GENERAL RADFORD: Objection.

THE COURT: Sustained. Irrelevant. Approach.

(WHEREUPON, a bench conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

THE COURT: Typically, whether he believes -- typically, whether one person believes another person is not relevant. However, upon reflection, it is relevant whether Mr. Garrett as a prosecutor in the Mathews case, believed the witness because of his duty to only call a witness that he believes would testify truthfully. I will permit the question but—I will permit the question to be answered, but I do not want a discussion about the content of the witness because that is

* * * *

[84] Your Honor?

THE COURT: You may hand up.

(WHEREUPON, the witness is furnished with above-requested document.)

Q (By Mr- Terry) My question, General Garrett, is whether or not you can identify that document?

A Yes, sir, this is my writing.

Q Would you tell—Your Honor, I would move to make it an exhibit? Would you tell the jury—tell the Judge, what that is?

A It is—basically, it's a witness list that was prepared—probably prepared in January or February 1995, in preparation for motions in March of 1995. It refers to suppression motions, Courtney Mathews.

Q Does it refer to Mr. Mathews' automobile?

A Yes, it does.

MR. TERRY: Your Honor, I would move to make this document an exhibit?

GENERAL RADFORD: Objection as to relevance.

THE COURT: Objection sustained at this point without further foundation.

MR. TERRY: Let me ask you—Mr. Garrett, what were you doing when you prepared that document?

A I was preparing for a round of pretrial motions, but Mr. Terry, I can't tell you now what motions those [85] were? I mean, apparently it was a suppression motion that dealt with. Courtney Mathews.

Q What instances, what were you trying to do with. regard to Mr. Mathews' automobile?

THE COURT: Don't answer the question. Counsel, step up.

(WHEREUPON, a side bar conference was had between Court and Counsel, the same being within the presence but outside the hearing of the jury as follows:)

THE COURT: Now, Counsel, sometimes both of you have operated under the assumption that I know what is going on in your head? There are times when there should be jury-out hearings that I don't know about that you have to ask about, everything you go into is not supposed to be dealt with: in front of the jury? If there is some line of questioning or some evidence that you believe that I should deal with in a jury-out hearing, you need to alert the Court. I have no idea what you are going to do?

MR. TERRY: This document, Your Honor, I don't believe we need the jury-out for this document. This document is his notes in preparation for the Mathews case where he emphasizes the importance of putting Mr. Mathews' car at the Taco Bell at midnight on the [86] night of the murder.

GENERAL RADFORD: Your Honor, why don't he just ask him did he consider it important to put his car there and if he says yes, there is no need to go any further?

THE COURT: Do that.

(WHEREUPON, end of sidebar conference.)

Q (By Mr. Terry) Mr. Garrett, in preparing the Courtney Mathews' case, did you consider it important to locate or to put Mr. Mathews' automobile, Mr. Mathews' automobile at the Taco Bell at midnight?

A Yes, sir—at midnight? To put it down there in general, yes.

Q Well, at midnight?

A It was important to put it down there particularly during the early morning hours of January 30th, 1994.

Q Does that document help you as far as the time?

A I don't understand your question. It was important for me to put Courtney Mathews' car down there at that Taco Bell Restaurant, after midnight.

Q Did you use Brian Tansel to do that?

A Yes, sir.

Q Did you use other witnesses to do that?

A During the trial of the Courtney Mathews case. His was the only testimony I recall about Mathews' [87] automobile, the only State's witness' testimony. Now, there was other testimony about a—

GENERAL RADFORD: Objection as to the testimony—

THE COURT: Sustained. Next question please.

Q (By Mr. Terry) Why was it important to put Mr. Mathews' automobile at the Taco Bell?

A Mr. Terry, you have to be there to kill them.

Q And he had to get there?

A Yes, sir.

Q So is it your theory that he drove himself to the Taco Bell?

A It is my theory that he drove himself—could to the Taco Bell, but there were several cars involved in this criminal episode and that there were several participants involved in this criminal episode.

Q Did you represent to the jury in the trial of Courtney Mathews that Courtney Mathews drove himself to the Taco Bell?

A I represented to the jury that he was down there inside that restaurant.

Q Did you represent—Your Honor, that is not responsive. I ask the Court to direct the witness to answer the question.

THE COURT: Restate the question.

[88] Q (By Mr. Terry) Did you represent to the Courtney Mathews jury that Mr. Mathews drove himself to the Taco Bell?

A I don't recall representing that to them.

Q Let me make sure that I understand. You are saying that you represented to the Courtney Mathews jury that Mathews' car was at Taco Bell at midnight and after? But you didn't represent to them that be of you don't recall representing to them that be drove himself there?

A I don't recall that.

Q Do you recall representing to the Taco Bell Courtney Mathews jury taht Mr. Mathews left Ryder Avenue with the weapon that he used to kill these people at about 11 o'clock and he left Ryder Avenue in his automobile?

A Yes, sir.

Q And then you represented to that jury that at about midnight, that car was at Taco Bell?

A That's correct.

Q And in between, you represented to that jury that Mr. Mathews was seen going across the parking lot from where the car was parked and entering the Taco Bell, didn't you?

A That he was seen entering the Taco Bell? No, I didn't represent that to the jury. I represented [89] to the jury that he crossed in front of Michelle Anatayla's (phonetic) headlights.

Q About 11:30?

A About 11:30.

Q Did you call Yolanda Marazia (phonetic) as a witness?

A Yes.

Q For what purpose?

A To establish that Mathews was inside the Taco Bell, 1:00 to 1:30 range.

Q Did you use this witness to establish what Mr. Mathews was doing inside the Taco Bell?

A Yes, I did.

Q What was your purpose?

GENERAL RADFORD: Objection—

THE COURT: Overruled.

A What was my purpose? I am sorry, I don't understand?

Q With regard to what Mr. Mathews was actually doing inside the Taco Bell at 1:30, what were you trying to show that he was doing?

A He was inside the Taco Bell—

GENERAL RADFORD: Your Honor,. I object. It is still hearsay.

THE COURT: Overruled.

THE WITNESS: —inside the Taco Bell dining room area and he was talking with a female employee [90] African American, probably Ms. Price.

Q Did you argue before the Mathews jury that at 1:30, Mr. Mathews was inside the Taco Bell according to this witness and was talking to Patricia Price?

A Yes.

Q At 1:30, correct?

A I think so, within a thirty minute block, 1:00 to 1:30 range.

Q Did you call Frankie Sanford

A Yes, sir, sure did.

Q What\was the purpose of introducing Mr. Sanford to the Courtney Mathews jury?

A Sanford—Mathews was inside the Taco Bell Restaurant about¬ 1:45, 2:00 a.m.

Q Did you believe that Mr. Sanford's testimony was truthful?

GENERAL RADFORD: Objection—

THE COURT: Overruled, yes or no.

THE WITNESS: Yes.

Q (By Mr. Terry) Was Mr. Sanford's testimony, eyewitness identification?

A Yes.

Q And you believed that to be true?

A Yes.

Q Did you represent to the Courtney Mathews jury [91] that Mr. Mathews worked until 9:11, left Taco Bell and went home to Ryder Avenue?

A I believe he got off around 9:00 and I represented to them that he went home to Ryder Avenue, correct.

Q Did you believe those facts to be true?

A Yes, sir.

GENERAL RADFORD: Objection—

THE COURT: Overruled.

Q (By Mr. Terry) Did you represent to the Mathews jury that once Mr. Mathews was home at Ryder Avenue, that h.e spent approximately an hour, an hour and a half there and then left with the weapons that he used to kill the four victims?

A That would have been about—he left about 10:30 from Ryder Avenue, thereabouts? Yes, sir.

Q Did you believe those facts to be true?

A Yes, sir, I did.

Q Did you represent to the Mathews jury that Mr. Mathews when he left Ryder Avenue, showed the weapons to his roommate and made statements that they would not see these clothes again and that he left there with a black glove and that he left there with latex gloves? Did you make those representations to the jury in the Mathews case?

A Yes, sir.

[92] Q. Did you believe them to be true?

A Yes, sir.

Q Did you represent to the Mathews jury that Mr. Mathews was concerned about his roommate touching the weapons and leaving fingerprints on the weapons?

A Yes, sir.

Q Did you believe that to be true?

A Yes, sir.

Q Did you represent to the Mathews jury that he was dressed in layered clothing when he left there?

A Yes, sir.

Q Did you believe that to be true?

A Yes, sir.

Q Did you bring Alan Cerudi (phonetic) before the Mathews jury?

A Yes, sir.

Q For what purpose?

A To establish that Mathews or an African American male was inside that Taco Bell at about 4:00 or 4:30 range, a.m. on January 30th, 1994.

Q Did you believe that to be true?

A Yes, sir.

Q Is it your testimony then that you believe that Courtney Mathews was looking out the back door of the Taco Bell Restaurant at about 4:00 a.m. on the night [93] of the murders?

A Yes, sir. However, there were other—there was one other—there was talk of one other male black being described in there, in the course of the investigation, at least one other.

Q Mr. Garrett, I want to make sure that you are not qualifying your answer. My question to you is did you represent to the Mathews jury that Mr. Mathews was looking out the back door of the Taco Bell Restaurant at 4:00.a.m. on the night of the murders?

A You know, actually during the course of the argument I don't believe I referred to Alan Cerudi. If I had it to do over again, I would have. But I think just in the excitement of the argument, I missed over him, but I wanted the jury to draw the inference that he was, in fact, in that Taco Bell Restaurant at 4:00 or 4:30 in the morning, no doubt about that.

Q Did you believe that to be true?

A Yes, sir, I did.

Q Do you believe that to be true today?

A I sure do.

Q Mr. Garrett, you have had an opportunity to examine what I believe—I think you read completely while you were on the witness stand, Exhibit Number 87, which is Mr. Housler's statement of October 20th?

[94] A Yes, sir.

Q Is this a false statement?

A No, sir.

Q Is this a true statement?

A Yes, sir, in substance, it's true.

MR. TERRY: I would like to ask that the witness be handed a copy of the statement?

THE COURTi Would you hand that up?

GENERAL RADFORD: May we approach.?

(WHEREUPON, a bench conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

GENERAL RADFORD Again, we are where we were—we are at the same place that we were with General Carney before the Court admonished Mr. Terry, but if he specifically

asks him if he believes certain portions of this statement to be true or untrue, the State feels that I can come back on redirect and ask him about other portions and if he believes them to be true or untrue? I think this is highly proper of him to give an opinion on evidence, but I can assure Mr. Terry that Mr. Garrett believes that his client was down there at Taco Bell participating and if he wants to get into that, we'll go, but I feel like [95] it is treacherous ground and it is improper, but I fully believe that I should be able to take this same line questioning that the defendant does.

THE COURT: Let's break for lunch right now anyway.

(WHEREUPON, end of bench conference.)

THE COURT: Ladies and gentlemen, it is approaching the lunch hour and so why don't we take our break at this point?

Please just put your pads face down and remember your admonitions and if you will move into the jury room, the Court Officer will be with you shortly.

(WHEREUPON, the jury was excused from Open Court, and the following proceedings had:)

THE COURT: Officer, if you will just let me know when you are ready to exit the courtroom, just interrupt me and let me know.

Mr. Garrett, you can step down and don't discuss your testimony during the lunch break. See you about 1:15.

(WHEREUPON, the witness was excused from open Court.)

THE COURT: Counsel, I can handle your discussion a little bit better in this setting rather [96] than over at the sidebar when it tends to be a little lengthy.

Let's discuss what you were saying over here now? It is your objection, Mr. Radford?

GENERAL RADFORD: I think he's getting the witness to comment or he's asking whether he believes this or believes that? Of course, the belief of a witness is immaterial and he just states what he knows and then that's the end of it. In this case, Mr. Terry, is insistent that he wants to get into his beliefs and the point that I was making, once you open up what a witness believes, then I am of the opinion that you open it up for the State as well as for the Defendant. And one of the admonitions that I was given, or at least we are in the same situation we were when General Carney, when Mr. Terry withdrew his question, asking for his theory, is the same as asking what he believes or what he thinks or what he suspects to be true? And he is getting on a slippery. Slope because I want Mr. Terry to know—and of course, I don't know how the Court will rule and I can only anticipate that, but if he asks what he believes on part of the statement, the State should be able to ask what he believes on the other parts of the statement? And I can assure Mr. Terry that Mr. Garrett's belief is that this man [97] was down there and participating. That's what I object to.

THE COURT: Do you want to respond to that before I rule?

MR. TERRY: No, Your Honor.

THE COURT: Normally, whether a witness believes another person is immaterial or irrelevant, I should say. It is for the jury to decide whether someone is worthy of belief or not? The only reason that the Court permits Mr. Garrett in a very limited fashion to comment on whether he believes a particular witness that was offered in the Mathews trial, is because of Mr. Garrett's duty as the prosecuting attorney in the Mathews trail to offer up testimony that he in good faith believes is true. And it is relevant whether or not Mr. Garrett is the prosecuting attorney in the Mathews case, would offer a witness that he did not believe was true. That's very relevant. So the Court permits Mr. Garrett to comment on whether he

believed that a witness was going to offer truthful testimony before he called that witness to testify. So that's the relevancy of Mr. Garrett's belief in the witness that was offered in the Mathews trial, and again—normally, whether you believe a witness is irrelevant because that's a jury question, but the connection [98] nexus between Mr. Garrett's belief in the truthfulness of a witness in a Mathews case and this case is because of the apparent inconsistencies on the face of the Housler statement with the evidence that was offered in the Mathews case, do you understand the basis for the Court's ruling? I mean, the fact that on its face the Housler statement appears to be in some part inconsistent with the testimony that was given at the Mathews trial makes Mr. Garrett's conduct at the Mathews trial relevant on the question of the Housler statement. So that's the only reason that the Court permits Mr. Garrett to comment on that. Now, if you wish to go further, Mr. Terry and it sounds like that's about where -it sounds like that's what you want to do. If you want to ask Mr. Garrett if he believes Mr. Housler's statement, that's an improper question. It is not relevant whether he believes the Housler statement, but if you want to ask him whether a particular part of the Housler statement is inconsistent with the position taken at the Mathews trial, it sounds like it is a subtle difference there and it is perhaps a subtle difference, but there is a difference. Do you understand what I am saying?

MR. TERRY: Yes, I do, Your Honor.

THE COURT: If not, I will try to make [99] myself more clear.

MR. TERRY: I understand, I asked that one question with a little hope that he would say that this is a false statement and its gone. And he didn't say that. He didn't say yes to that, so I would—I propose to do what you suggested, to go through the statement and ask him about apparent inconsistencies.

THE COURT: That's the reason that I sustained Mr. Radford's objection when you ask if it is false? It doesn't matter whether he believes it is false, only if there are—if you want to point out inconsistencies with the Mathews testimony.

Do you understand the ruling now?

GENERAL RADFORD: Yes, sir, and I have a question.

THE COURT: Yes?

GENERAL RADFORD: If he does that, is the State allowed to go through the statement and point out consistencies with the Mathews testimony?

THE COURT: I think in fairness, sure.

GENERAL RADFORD: Then that's what I am getting at.

THE COURT: That's the point that you are trying to make?

GENERAL RADFORD: That's exactly what I intend to do?

[100] THE COURT: Yes. Anything else?

MR. TERRY: No, Your Honor.

THE COURT: We will recess for lunch.

(WHEREUPON, Court was recessed; Court was again called to order at 1:15 p.m.; the jury returned to open Court, and the following proceedings had:)

THE COURT: Afternoon, ladies and gentlemen. Were there any problems with the Court's admonitions over your lunch break?

(NO AFFIRMATIVE RESPONSE WAS INDICATED.)

THE COURT: Good. Let's see, Mr. Terry, you may resume your cross examination of the witness, Steve Garrett.

CROSS EXAMINATION CONTINUED

BY MR. TERRY:

MR. TERRY: With the Attorney General's permission, we would like to publish an aid to use in this examination?

THE COURT: All right.

(COUNSEL COMPLIES WITH REQUEST.)

Q (By Mr. Terry) Mr. Garrett, if you would take a moment to look at this aid—I would like to ask [101] you some questions about it. Let me know when you have had a chance to orient yourself?

GENERAL RADFORD: Your Honor, may we approach?

(WHEREUPON, a bench conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

THE COURT: There is a correct way and an incorrect way to do this. You are representing this to be, almost at a level of evidence. This is not evidence. This is an aid. Why don't you cover everything up and go down it one line at a time and ask about it one line at a time?

MR. TERRY: I asked—I gave this to the D.A. and I asked him about it, I, said do you have any problem with. it? He said nothing.

GENERAL RADFORD: No problem with him using the aid. I have some problems with a couple of things in there though. that—for instance—taking it as a fact and asking him of things that have not been introduced into evidence like Mathews asked a customer about deposit or something? There is no proof of that at all.

THE COURT: The two of you are starting to try my patience. You call yourself conferring, [102] and then after you so-call confer, you don't agree and here we are and the

jury is brought back and there has not been one question asked and we are over here at a sidebar. Now, when you people confer, would you please confer in the true meaning of the word. Look things over, decide whether you agree or disagree and quit deciding after things have been put up on the screen.

GENERAL RADFORD: I apologize for that, Your Honor. You are correct about that. I didn't.

THE COURT: Go ahead.

(WHEREUPON, end of sidebar conference.)

THE COURT: Mr. Terry, go ahead please.

Q (By Mr. Terry) Mr. Garrett, I would like to direct your attention to this document. Have you had an opportunity to—

A Not yet, if I might?

(WHEREUPON, the witness inspects above-mentioned document.)

THE WITNESS: All right, sir.

Q (by Mr. Terry) Mr. Garrett, beginning with. the first item at 10:00 a.m., do you recall if you represented to the Courtney Mathews jury, just that, that Courtney Mathews woke Kendra Corley at about 10:00 a.m. on the night of January 29th, and told her that he would be [103] late that night and that he was going to Nashville with the guys?

A No, I did not make that representation to the jury in the Courtney Mathews case.

Q Do you believe that representation to be consistent with the facts that you learned in this case?

GENERAL RADFORD: Objection—

THE COURT: Sustained.

Q (By Mr. Terry) Directing your attention to the second item, 2:10 p.m., did you represent to the Courtney Mathews

jury that Courtney Mathews went to work at Taco Bell about 2 o'clock that afternoon?

A I don't recall representing to the Courtney Mathews Jury that he went to work at 2:00 that afternoon?

Q Okay, in the course of your preparation for trial, were you. aware that Courtney Mathews was working at the Taco Bell that day?

A Yes.

Q Did you represent to the Courtney Mathews jury that he was working at the Taco Bell that day?

A Yes.

Q Did you—looking at the next item, did you represent to the Courtney Mathews jury that at approximately 7:55 that evening, Courtney Mathews questioned a customer that came into the Taco Bell regarding Taco Bell money [104] deposits?

A I am not sure that I understand your question when you say did I represent—are you talking about closing argument?

Q No. Let me ask you this way. Did you bring to the Courtney Mathews jury a witness by the name of Mr. Wall?

A That's correct.

Q What was the purpose of calling Mr. Wall?

A To establish that Mathews had asked Mr. Wall to—basically, are you here to pick up the deposit? Sometime during that evening before he checked out? I don't know if it was 7:55, I don't know where you got that unless Mr. Wall testified to that?

Q Did you believe that Mr. Wall's testimony was truthful?

A Yes, while Mathews worked on that shift, that Saturday night, yes.

Q Do you believe today that Mr. Wall's testimony was true?

A Yes, sir, I do.

Q Did you represent to the Taco Bell, to the Courtney Mathews jury that Mr. Mathews left the Taco Bell kat

approximately 9:11 or punched out at approximately 9:11 that evening?

[105] A Approximately that time, yes sir.

Q I think we have already discussed the next item, so let me hurry, through them—did you represent to the Taco Bell jury that Courtney Mathews then went to Ryder Avenue?

A Yes, sir.

Q Did you believe that fact to be true?

A Yes, sir.

Q Do you believe it to be true today?

A Yes, sir, I do.

Q Did you represent to the Taco Bell jury then that he made long distance phone calls including a call to his father, Godfrey Mathews, in New York?

A Did I represent to them that fact? I believe there was proof about some long distance phone calls but I don't remember the specifics of it but in terms of making a closing argument or pursuing my closing argument on that fact, I don't remember that.

Q Did you represent to the Taco Bell—we covered the next several items, so I won't read them. But basically, that's the—summary of the scenario at Ryder Avenue?

A Well, if I am not mistaken, Mr. Terry, representation were that he left somewhere around 10:30 p.m., Ryder Avenue and he had a bowling ball bag and last seen [106] going down Lafayette Road, and I believe he stopped at a convenience store there. At 11:15, Michelle Anataya, 11:15, 11:30 range—12:10, Brian Tansel, yes.

Q Okay. One o'clock, I think we have already discussed that you represented to Ms. Marazio (phonetic)?

A I believe it was sometime after 1:00, I would say 1:15 to 1:30 range, would be a—what I would call—

Q At 1:30, we have Mr. Samford, we have already covered that. You represented that Mr. Samford positively identified Courtney Mathews in the Taco Bell at 1:30? Is that correct?

A I believe I represented to the jury that he came through there about 1:45 a.m.

Q But he made a positive identification of Courtney Mathews?

A Yes, sir.

Q And you believed it then and you believe it now, is that correct?

A Yes, sir.

Q I think we have covered Mr. Cerute (phonetic) at 4:30, and let's look at th.e last item. At 5:30 a.m., did you represent to th.e Courtney Mathews jury that Mr. Mathews arrived home at approximately 5:30 a.m. (sic) that night?

[107] A No.

Q What is incorrect about it?

A I didn't represent to the jury that he arrived home at 5:30 a.m. In fact, my best recollection is that he got home around 7:00 a.m. There wasn't any reference to his arriving at—I don't specifically remember making that argument in the closing arguments.

Q Did you call Kendra Corley as a witness in the Taco Bell—

A Did not.

Q Did you call Shante Ward?

A Yes.

Q For what—let me just strike that one. Let's put up the next aid—

THE WITNESS: Excuse me, 2:40—would actually have been about 2:35 a.m. —

THE COURT: Speak more directly into the microphone.

THE WITNESS: 2:35, it would have been about 2:30 to 2:35 p.m. witness in Shoney's hears two loud noises. He actually heard, I believe—it was two or three loud noises. My recollection was three. That particular witness—you have got the—let's see, Mark Jolly. 1:45 witness passed the Taco Bell—1:45 designation, witness passes Taco Bell, store still

[108] open? I don't know who that witness was, Mr. Terry?

MR. TERRY: I don't mind answering his question—

THE COURT: Mr. Terry, you need to ask a question. Mr. Garrett, you need to be responsive to a question. Do you have another question, Mr. Terry, about this on the board?

MR. TERRY: Well now, I do.

THE COURT: Ask it please.

MR. TERRY: Did you introduce to the Courtney Mathews jury a witness by the name of John Ballard?

A Ballard, yes, Assistant Manager of Taco Bell.
Q For what purpose?
A He passed through the—

THE COURT: Please—rather than a rendition of his testimony, the question was for what purpose did you offer that testimony?

THE WITNESS: All right, he was down there—the purpose was to establish that he was down there at approximately 1:45 a.m. that morning.

Q (By Mr. Terry) Did you believe that to be truthful then?
A Yes, sir.
Q Do you believe it to be truthful now?
[109] A Yes, sir.
Q My understanding is that there is no objection to the publishing of this aid that was published yesterday?

GENERAL RADFORD: No objection.

(COUNSEL COMPLIES WITH REQUEST.)

Q (By Mr. Terry) Mr. Garrett, you have reviewed State's Exhibit Number 87?
A Yes, sir.
Q Read it today? I would like you to—

THE COURT: We need a question and an answer, Counsel. You are both lawyers. Please ask a question, let me get an answer. I want the record to have a question and an answer. Go ahead, Mr. Terry?

Q (By Mr. Terry) Mr. Garrett, will you read the first paragraph. that is published on the screen?

A (No response).

Q Would you read it out loud?

A Housler went to Kentucky trailer with. Sulyn, Mathews, Corley, Tween, Darwish, Dana, (inaudible).

Q Is that paragraph consistent with the statement that is marked as Exhibit Number 87?

A Yes, sir, generally consistent.

Q Is that paragraph consistent with. the proof that you represented to the Mathews jury?

A Is it consistent with. proof that I introduced?

[110] Q. Yes, sir.

A Mr. Terry, it is neither consistent nor inconsistent with the proof. I was trying—

THE COURT: Mr. Garrett, please—respond to the question.

THE WITNESS: In terms of the strict proof in the Taco Bell case, no.

Q Thank you—

A But the objective of the Taco Bell case was to try Courtney Mathews, sir.

Q What was the paramount objective of a prosecutor, Mr. Garrett?

A The paramount objective is to seek the truth. We were prosecuting Courtney Mathews in an effort to seek the truth, sir.

Q This paragraph is not consistent with that proof, is it, Mr. Garrett?

A (No audible response).

Q I think you have already answered that question? I would like you to read the second paragraph, Mr. Garrett.

A All right, sir, I have read it.

Q Did you represent to the Mathews jury that a man by the name of Mr. Dickson, Fitz Dickson and Mr. Mathews bought the ammunition that was used in the [111] Taco Bell murders?

A Yes, sir, I did.

Q Well is this paragraph about Mr. Housler buying the ammunition consistent with the proof that you represent(to the Taco Bell jury?

A Not consistent with the strict proof—

Q Thank you. Would you read the third paragraph.

GENERAL RADFORD: Your Honor, if the witness has—

THE COURTS: You have redirect, Mr. Radford.

GENERAL RADFORD: Thank you.

(COUNSEL COMPLIES WITH REQUEST.)

A All right.

Q Did you read the third paragraph, Mr. Garrett?

A Yes, sir.

Q Out loud please?

A Housler goes to Showboat Arcade to find Hippie Dude. Hippie Dude not there.

G Mr. Garrett, when you and Mr. Carney confronted Mr. Housler and said that he had breached his contract with the State, you represented that you had attempted to corroborate that statement?

A Yes, sir.

Q Isn't this one of the items that you had attempted to corroborate and could not corroborate?

[112] A That is correct, Mr. Terry.

Q Would you read the fourth paragraph.?

(WITNESS COMPLIES WITH REQUEST.)

A All right, sir, I have read it.

Q I think we have covered it, I am not going to ask you any questions about that.

Would you read the fifth paragraph out loud, Mr. Garrett?

A Housler returned to Kentucky trailer, news program ending, group talks about the robbery, one to two hours.

Q When typically, is the news program ending in this area, Mr. Garrett?

A 10:00, 10:30 range.

Q Is it consistent with the proof that you offered to the Courtney Mathews jury that Courtney Mathews would be in a trailer in Oak Grove, Kentucky at 10:00 to 10:30 on the night of the murders?

A No, sir, because I wasn't trying :Courtney Mathews and David Housler together?

Q I understand that. What is your paramount obligation when you are trying a case?

A It's to seek the truth, Mr. Terry.

Q Not to convict whoever is sitting over there, is it?

A It is to seek the truth, sir.

[113] Q Right, and the truth ought to be the same in both cases, shouldn't it, Mr. Garrett?

A No, sir, not necessarily.

Q Really, the truth changes case-by-case, Mr. Garrett? Is that true?

A (No audible response).

Q Is that what you are telling this jury?

A I am telling this jury this. That the evidence in the Courtney Mathews case was that at 2:30 a.m. in the morning—

MR. TERRY: Unresponsive, Your Honor.

THE COURT: It is too broad. Is that what you are telling this jury? I don't understand the question. Form a question designed to get a specific response please, Counsel.

Q (By Mr. Terry) Does the truth change case-bycase, Mr. Garrett?

A The truth does not change case-by-case, Mr. Terry.

Q Thank you, thank you. Would you read the next paragraph out loud, Mr. Garrett?

A Group leaves Kentucky trailer in two cars, group stops at Minit Mart for beer and cigarettes.

Q Mr. Garrett, is that consistent with the proof that you took—that you represented to the Courtney Mathews jury?

[114] A I didn't introduce that particular item in the Courtney Mathews jury.

Q That's not my question, Mr. Garrett. My question—

A It's not consistent with the proof.

Q It's not consistent with the proof? The last paragraph please?

A Taco Bell, Mathews and Tween get out of car. Housler and Sulyn sit in car for twenty minutes. Hear shots and leave.

Q Is that consistent with the proof that you represented to the Mathews jury, Mr. Garrett?

A Mr. Terry, yes sir, it is. The lights blinked twice, three shots.

Q Just a yes or no, Mr. Garrett?

A Yes, sir.

Q Let's check that out. Looking at the last paragraph, are you telling this jury that it is consistent with. the proof that you represented to the Mathews jury that Mr. Mathews arrived at the Taco Bell in David Housler's car? Is that what you are telling us?

A I am telling you I don't know how Mathews got down there? His car was down there. But I am also telling you that my theory and the theory then was that he had been down there—

MR. TERRY: Your Honor, I am just asking [115] him to answer my question.

THE COURT: Please be responsive to the question.

THE WITNESS: What is your question, Mr. Terry?

MR. TERRY: The question is, Mr. Garrett, whether or not the representation that Mathews arrived at the Taco Bell murder in David Housler's car is consistent with the representations that you made to the Mathews jury?

A The best way I know to nswer you is—

MR. TERRY: Excuse me, Your Honor—

THE COURT: Go ahead, Mr. Garrett.

THE WITNESS: —is that—I am sorry, sir. Would you repeat your question again so that I can make sure that I understand it?

Q Is the representation that Courtney Mathews arrived at the Taco Bell murder in David Housler's car consistent with the representations that you made to the Courtney Mathews jury?

A The accurate response is it's neither consistent nor inconsistent.

Q Did you represent to the Mathews jury that Mr. Mathews car was out back?

A Yes, sir, I did.

[116] Q. Did you do that for some purpose other than to tell—to represent to that jury that Mathews drove up there after h.e left Ryder Avenue and that he was there? Did you have another purpose other than that?

A No.

MR. TERRY: Your Honor, with. your permission, I would like to publish to the jury Exhibit 17?

THE COURT: Yes.

(WHEREUPON, Counsel complies with. request.)

Q (By Mr. Terry) Mr. Garrett, please take your time and become familiar with Exhibit Number 17.

A All right, sir.

(WITNESS COMPLIES WITH REQUEST.)

THE WITNESS: It's the interior diagram of Taco Bell.

Q (By Mr. Terry) What is that?

A Rear service door of Taco Bell.

Q What is that, Mr. Garrett?

A That would be the north entrance of the Taco Bell.

Q Is that the double doors, as they are called?

A I believe they are, in fact, double doors?

Q What is that?

A I believe that is yet another entrance into the dining room facility.

[117] Q. And that?

A Should be the drive-thru window cashier's compartment or room.

Q Thank you. Your Honor, with your permission, I would like to publish to the jury Exhibit Number. 12?

THE COURT: Yes.

(COUNSEL COMPLIES WITH REQUEST.)

Q (By Mr. Terry) Are you familiar with this exhibit, Mr. Garrett?

A It is—yes, I am generally familiar with it.

Q Are those the double doors that we just talked about?

A Should be the double doors—I believe it is on the north side of the building, Ft—Campbell Boulevard would be to your left and across from that would be generally, Quality Inn Motel.

Q Where would McDonald's be, Mr. Garrett?

A Should be across the street, generally from Taco Bell and probably to the left?

Q Would McDonald's be out here? Is that the area of McDonald's? That direction? Or up here?

THE COURT: If you want to step down, you may.

(WITNESS COMPLIES WITH REQUEST.)

[118] THE WITNESS: That would put McDonald's right about here (indicating). It is right there on the corner, generally across the street from Taco Bell.

Q Across Riverside Drive, correct?
A Yes.

MR. TERRY: Your Honor, with your permission, I would like to publish Exhibit 6 to the jury?

THE COURT: Motion granted.

(COUNSEL COMPLIES WITH REQUEST.)

MR. TERRY: Mr. Garrett, can you identify that? Are you familiar with this exhibit?

THE WITNESS: The rear service door of the Taco Bell.

Q And to the right of the exhibit, would that be the drive-thru window?
A As you look—as you look from this vantage point, the right would be the drive-thru.
Q And this is what? What's that stuff right there?
A That's the menu on the plackard on the front and so forth like that.
Q And does that form a type of barrier there, where the menus, where the structure is and the menu is on it, and the thing you talk into and all that?
A When you say "barrier", I think it sits out on that cement island there, I'm not sure?
[119] Q But there is some structure there?
A Yes.

GENERAL RADFORD: May we approach?

THE COURT: Yes.

GENERAL RADFORD: I have an objection?

THE COURT: Can you not state simple grounds? If you can't, tell me you can't.

GENERAL RADFORD: I can't.

(WHEREUPON, a side bar conference was had between Court and Counsel, the same being within the presence, but outside the hearing of the jury as follows:)

GENERAL RADFORD: I can't in one word, but I think Mr. Terry would stipulate that this is Taco Bell as it is now. He has already used—and it's not Taco Bell in 1994, so I think it would be error—the witness doesn't know that, but Mr. Terry knows that.

MR. TERRY: I will mention it.

THE COURT: But technically speaking, that was something that you could bring up on redirect.

(WHEREUPON, end of side bar conference.)

Q General Garrett, I want to bring to your attention that this is a picture of Taco Bell as it exists now, and not in 1994?

[120] A Yes.

Q This is the door that is there now, okay?

A It's the door that is there—

Q Now. This is not in 1994, a picture of the door then. I just wanted to bring that to your attention.

Your Honor, with your permission, I would like to publish Exhibit Number 5?

THE COURT: Yes.

(COUNSEL COMPLIES WITH REQUEST.)

Q Mr. Garrett, this is another picture of the same area. Are you familiar with it?

A Yes, sir. Rear service door, Taco Bell.

MR. TERRY: Your Honor, with your permission, I would like to approach this diagram?

THE COURT: Yes.

(COUNSEL COMPLIES WITH REQUEST.)

MR. TERRY: If I could, I would like to bring Mr. Garrett out just a little—

(COUNSEL COMPLIES WITH REQUEST.)

Q Mr. Garrett, would you show the jury on the diagram, approximately where the double doors are?

THE COURT: You may need to open yourself up just a bit, Mr. Garrett?

(WITNESS COMPLIES WITH REQUEST.)

A I believe there is a set of double doors, it [121] should be right about in here (indicating). And there may be a set of double doors on this side?

Q Well, would you show the jury approximately where the back door is?

(WITNESS COMPLIES WITH REQUEST.)

THE WITNESS: That door should be right about here.

Q (By Mr. Terry) Now, will you show the jury where the dumpsters are?

(WITNESS COMPLIES WITH REQUEST.)

A Right here is where a dumpster pad is represented on this diagram.

Q The dumpsters are out in back, is that right?

A Yes.

Q Would you hold that out so that the jury can see where the dumpsters are?

(WITNESS COMPLIES WITH REQUEST.)

Q Now, do you recall in Mr. Housler's statement, that he said that he pulled up with Sulyn, parallel to the double doors?

A (No audible response).

Q Do you recall that?

A I don't specifically recall that in his statement. I generally recall that he came up there with, Sulyn.

Q Well, if the statement says that he pulled up [122] parallel to the double doors, where would that be?

A There's a set of double doors on this side of Taco Bell, if my memory serves me correctly and then there is a set of double doors on this side of Taco Bell.

Q If the statement says that he was looking at McDonald's, where do you think it was?

GENERAL RADFORD: Objection—

THE COURT: Sustained.

Q (By Mr. Terry) Let me ask you to go back up to the witness stand for a second?

(WITNESS COMPLIES WITH REQUEST.)

Q I would like to republish. Exhibit Number 17?

THE COURT: All right.

(COUNSEL COMPLIES WITH REQUEST.)

Q Let me ask you this, Mr. Garrett, about Exhibit 17, didn't you direct the development of this exhibit? Didn't you—direct the construction of this exhibit?

A I asked that an interioryes, that an interior diagram of Taco Bell be made.

Q And you used this exhibit before the Mathews jury, didn't you?

A Yes, sir, I did.

Q Where are the double doors, Mr. Garrett? If I may step down—

[123] THE COURT: Yes.

THE WITNESS: If I recall, there is a set of double doors here (indicating), and there is a set of double doors here (indicating) on that side.

Q That doesn't look like a double door, does it, Mr. Garrett?

A I don't know what it looks like, Mr. Terry. I am simply telling you it is my recollection there is a set of double doors on each side of that dining room.

Q Let me ask you this, Mr. Garrett. If someone was sitting here in an automobile, with the front of the automobile looking at McDonald's over here (indicating) and they have the car running, can they see somebody running out the back door of this building towards the dumpsters?

A From that position right there that you have described?

Q Right here (indicating)?

A I wouldn't think so, sir, initially.

Q Would you think that if the car was running, Mr. Garrett, and they were sitting out there, that they would hear the door close?

A From that position right there?

Q Yes, Mr. Garrett?

A I don't know?

[124] Q Mr. Garrett, when you were prosecuting the Courtney Mathews trial, were the work records of Courtney Mathews available to you?

A Yes, sir.

Q Did you—

A When you say "you", they were available to the investigative team, and to us as the prosecution.

Q Did you review the work records of Courtney Mathews?

A No, sir, I didn't.

Q You did not?

A No.

Q So, you made no effort to determine when Courtney Mathews was at work and when he was off?

A Yes, sir, I did. The T.B.I. Agent, Jeff Puckett, and Alan Charvis, got that information and my recollection was that he worked that Saturday, that afternoon, and got off at 9:30. In terms of checking, let's say a work record for a week or so back, I don't specifically remember checking that.

Q When you took this statement to the Montgomery County Grand Jury and indicted this man for four counts of first-degree murder, had you taken the time to look at the Taco Bell work records, to see if Courtney Mathews was at work on the 21st of January?

A No, sir.

[125] Q Have you now become familiar with the Taco Bell work records that indicate that Courtney Mathews was at work until 3:14 a.m. on the 21st of January?

A Yes, sir, I have, and they do reflect that.

Q Does that indicate to you that huge portions of this statement that have to do with the trailer party on the 21st of January, that Courtney Mathews attended at 9:00 or 10 o'clock in the evening, are not true?

A Not, sir, it doesn't because the initial report of the investigators about the party trailer, was that it happened on the weekend of the 21st, 22nd, or 23rd.

Q. I am asking you about this statement, this says it happened on Friday, January 21, 1994?

A All right, I am not—I don't understand your question? If you will repeat it?

Q My question is have you learned now because of the work records of Courtney Mathews that he could not have been at this party on Friday, January 21st, 1994?

A There's a conflict, yes.

Q You as the lead prosecutor in that case, didn't determine that before you indicted this man? Let me strike that, Mr. Garrett. I apologize for that question. Let me ask you this. When was the first time that [126] you had this January 21st, date offered up to you?

A It would have been in the early part of January or February or March, 1994, the interview of James Dowlen.

Q When is the first time that my client offered you this January 21 date?

A Your client, Housler?

Q Yes, sir.

A I don't know that Housler was specific as to a Friday. He was specific as to being at th.e party trailer and to being a participant in that—what we came to call planning conversation.

MR. TERRY: Your Honor, with your permission, I would like to publish Exhibit Number 85, a copy of Exhibit Number 85 to the jury?

THE COURT: Motion, granted.

(COUNSEL COMPLIES WITH REQUEST.)

Q Mr. Garrett, you are looking at Exhibit Number 85, which is the March 21, 1994, statement that my client gave in your presence?

A Yes, sir.

Q And that you have identified as being accurate? On March 21, 1994, what date did David Housler tell you that he was at the Oak Grove trailer when—and Courtney Mathews was there?

[127] A The statement says 6:30 to 7:00 p.m.

Q What date?

A January 21st, 1994.

Q Friday, January 21, 1994.

A That's correct.

Q You had that date on March 21st, 1994, and on November 7th, 1995, you indicted this man for first-degree murder without ever checking out whether that was possible? Didn't you?

A Did I personally check it, no sir I did not check it.

Q Did you personally go before the grand jury and get an indictment for it?

A No, sir, I did not.

Q And you never took the time before that indictment was secured, or before a death penalty notice was given in December, to check the Taco Bell records and find out whether this party was even possible, did you?

No, sir, I didn't.

A. Mr. Garrett, you told this jury this morning that David Housler gave you all these details on October 19th. 1995?

A That's correct.

Q I would like the witness to have a copy of Exhibit 86 please?

[128] (WHEREUPON, the witness is furnished with above-requested exhibit.)

Q Mr. Garrett, have you had an opportunity to take a look at Exhibit Number 86?

A Yes, sir.

Q If David Housler gave you all those details on October 19th, why on October 20th, was he still only saying that he was at a party and he had gassed him up—

GENERAL RADFORD: Calls for evidence not in evidence, Your Honor.

THE COURT: Overruled, but it is compound. The question is stricken. Please reask.

Q Look at the second page, Mr. Garrett?

(WITNESS COMPLIES WITH REQUEST.)

Q The second page of this October 20th. statement. Do you have it, sir?

A Yes, sir. That's State's Exhibit Number 86, looking at page 2.

Q Would you agree with me that the only evidence in this case—in this statement, the only thing that Mr. Housler is saying is that he was at a party, 187 stuff, Mathews was there and no personal involvement, would you agree with that?

A May I read it, Mr. Terry?

[129] Q. Yes, sir, first paragraph on the second page?

(WITNESS COMPLIES WITH REQUEST.)

THE WITNESS: All right, sir, I have read the first paragraph of the second page.

Q My question to you, Mr. Garrett, is would you agree that essentially that is a re-statement of the "I was at a party, Mathews was there, Mathews was running his mouth, 187, and that's it"?

A Substantively, it includes what you have said.

Q And it doesn't have anything to do with we are at the Oak Grove trailer, we are going down there, we are outside, people are running out, twenty minutes, bang, bang, bang. None of that is there, is it?

A None of that paragraph states that, no.

Q So you didn't get that information on the 19th of October, did you, Mr. Garrett?

A Housler—yes sir, they very well could have. My remembrance is that he actually recounted on the 19th again what he had said on the 11th, up to that point in time.

Q You told this jury that on the 19th, he told you this elaborate story that had his own participation in it and then he came back in on th.e 20th and gave you the trailer story?

A I am telling the jury that on the 11th, he testified [130] or he said what I have testified to. I am telling the jury that on

the 19th, he gave an overview of his participation in this as a lookout. I am also telling the jury that as the agent took his statement, as I recall it, they started actually from the 11th or the materials that he disclosed on the 11th and brought it through the 19th and up to the 20th.

Q What agent took his statement?

A Puckett and Charvis, on the 19th.

Q How did they take it?

A I remember Puckett writing—my best recollection of it, not on the 11th, but on the—

Q Were you writing?

A No, sir.

Q Do you have any notes from any of these interviews, the 11th, the 19th, the 20th, the 21st, do you have notes from any of those interviews?

A Taken contemporaneously with the statement?

Q Yes, sir.

A No.

Q So you were the lead prosecutor in a quadruple murder, you are talking to somebody who says they are a lookout—

GENERAL RADFORD: Object, it's argumentative.

THE COURT: Sustained, rephrase the question

[131] MR. TERRY: I'll withdraw the question. Who was taking notes?

A When?

Q On the 11th, on the 19th, on the 20th, on the 21st, who was taking notes?

A I don't know. I was not taking notes on the 11th, I did not take notes on the 19th and the 20th.

Q When you prosecuted the Courtney Mathews case—I'll withdraw that.

When you prosecuted the Courtney Mathews case in May and June of 1996, did you have available to you Agent Puckett's rough investigative notes?

A No, sir, I don't believe we did?

Q I would like to show you a copy of a memorandum that you prepared in March of 1996. And ask you to review it and see if it refreshes your memory?

(WITNESS COMPLIES WITH REQUEST.)

THE COURT: While he is doing that, why don't we let the jury take a short recess. Please remember your admonitions, step into the jury room.

(WHEREUPON, the jury was excused from open Court; Court was recessed briefly; Court was again called to order; the jury returned to open Court, and the following proceedings had:)

[132] CROSS EXAMINATION CONTINUED

BY MR. TERRY:

Q Mr. Garrett, have you had an opportunity to look at that memorandum?

A Yes, sir, I have.

Q Is that a memorandum that you offered in March of 1996?

A Yes, sir, it is.

Q Does that memorandum make several references to rough investigative notes?

A Yes, sir, it does.

Q And it does it refer to rough investigative notes of Agent Charvis and Agent Puckett?

A Yes, sir, it does.

Q So is it a fair statement to say that in March. of 1996, you had available to you the rough notes of Agent Puckett and Agent Charvis?

A As to Agent Puckett, no sir.

Q Why not?

A Because after this memo was written and circulated to John Carney, the District Attorney General, the co-author of the memo., Helen Young, came to us and said that she had made a mistake. The rough notes of Agent Puckett were not, in fact, the rough notes of Agent Puckett but were the rough notes of Special Agent Steve Watkins.

[133] Agent Puckett, it was my understanding was destroying his rough notes as transcriptions of his interviews were being produced by the Central Office of the T.B.I. Judge Gasaway entered an order at some point in time before the Courtney Mathews trial that the rough notes of the investigators were to be retained. I don't remember when that order was entered, but—

Q From your personal knowledge, do you have any idea where the rough notes of Agent Charvis, Agent Puckett or—you say you didn't take anything?

A Right.

Q Do you have any idea where the rough notes of those two police officers are today?

A No, I don't.

MR. TERRY: I want to thank you for your testimony.

THE COURT: Redirect?

GENERAL RADFORD: No questions.

** WITNESS EXCUSED **

THE COURT: Mr. Radford, you may call your next witness.

GENERAL RADFORD: Carter Smith.

MR. CARTER SMITH was called as a witness and after being first duly sworn, was examined and testified as follows:

* * * *

APPENDIX L - Trial Court Findings, *Housler*, Post-Trial

IN THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT IN AND FOR MONTGOMERY COUNTY, TENNESSEE
CRIMINAL DIVISION

[Filed OCT. 15, 2002]

CASE NO. 034131 & 39217

STATE OF TENNESSEE,

Plaintiff,

-vs-

DAVID HOUSLER,

Defendant.

The Honorable John H. Gasaway, III

April 21, 2000
Volume II of II
Motion for new trial

Rita Moretti Scruggs
Court Reporter
19th Judicial District
Clarksville, Tennessee 37040

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[279] set of facts.

If you will allow me the time to do it, to finish this memorandum, I will detail those to you some more. have—

THE COURT: Let me say this, Mr. Terry.The Court recognizes that the prosecution of Courtney Mathews and the prosecution of David Housler by the State was on different theories.

There's two or three questions that I think are extremely important. The first and foremost is whether or not there is a legal prohibition for the State to do that. You say you have some law. I'll look at it.

The other is these examples that you've given, what duty does the Defendant have to put on Susan, I can't remember her last name.

MR. TERRY: We did.

THE COURT: Well, and all the rest of the witnesses that would contradict the first theory by the [280] State?

I can't—I'd have to go back and read the transcription. remember that you put on—I can't remember the witness that put the Firebird in the parking lot. But what I'm saying is—

MR. TERRY: That might have been Mr. Sirudy (phonetic spelling).

THE COURT: What I'm saying is assuming that the State uses different theories, and they did in these prosecutions, can the Defense complain about it if the Defense does not offer evidence or proffers to show the inconsistency?

MR. TERRY: Well, we—

THE COURT: And maybe that's in this case law. I don't know.

MR. TERRY: Well, now, what—I mean, I think it's—it's progress for us to have the Court state that there are different theories here.

What we need to convince you [281] now is that these theories are inherently factually contradictory, because I can satisfy the first requirement that there is a prohibition.

And it basically says this from the prosecution's advantage, and probably should say the same thing about the defense, it's not gamesmanship. We're not playing games here. This is not games.

And if you think—if you know that that Firebird or Sunbird was up there and you have competent proof that you accept, then you cannot try to prove something other than that if you represent the government.

THE COURT: All right. I understand exactly what you're saying.

MR. TERRY: Okay. All right. I would like to, with your permission, finish this argument in writing and present it to you. It's tied to—and I'm sure you understand this too, but it's tied, very much, to [282] the argument that we make with regard to starting off with a false—with a confession that has false information in it. Because we think that that is their theory. Their theory begins false.

THE COURT: Well, the State said that they did not believe everything in Mr. Housler's statement. It's because they disbelieved portions of his statement that prompted the action against him in the reindictment. The State makes no—has never said otherwise, to my knowledge.

MR. TERRY: But once they say it and we say it and you recognize it, then it can't go there.

THE COURT: Well, show me some law, Mr. Terry.

MR. TERRY: Well, it's false testimony.

THE COURT: Well, I don't have the benefit of my memorandum that I wrote years ago on the question, but [283] it has to do with—my recollection is it has to do with the jury being the judge of the facts, the judge of the credibility of witnesses, the Court not making a finding of fact, which is what the Court would have to do to say this fact is true—or this fact is false, this fact may or may not be false so we'll let the jury decide that, the next fact is false, and those ones that are false have to come out.

By my recollection, the Court's memorandum basically said that the Court knew of no basis, legal basis, for the Court

to make a judgment on what fact was true or not. But that's my recollection.

MR. TERRY: Let me give you this example, and tell me when you're tired of us and I'll—

THE COURT: Well.

MR. TERRY: Are we there? I just want to give you this one response to what you said—what you—the point where I'm right now.

[284] If Housler says—let's take—different case; okay? But in the case there's a car. Housler says the car is blue. State of Tennessee says the car is red. And we come in here with all the proof on earth that convinces you to say it's blue, I think it's blue. If you make that decision and exclude blue or red from them, then I agree with you one hundred percent.

But if Housler comes in and says the car is blue, they say the car is blue, you say the car is blue, none of us can say to them the car is red. And that's the difference.

And that was what happened when Garrett and Puckett and everybody got up there and said the first part of this statement, and lots of the rest of it is nonsense. The State said it's nonsense. We said it's nonsense.

So, both cars—we're both saying the car is blue, so we can't come over and tell these people, who have enough trouble trying to sort [285] everything out from all of this black hole of information that it's a red car. Nobody can do that; I can't do it; neither can the State, because there's no dispute on that fact that that's a misrepresentation of fact. And that's the difference.

That—your memorandum, I think, assumed there was a dispute. There was no dispute as to fact. So, we have to—I'm through.

THE COURT: Mr. Radford?

MR. RADFORD: Thank you, Your Honor. I'll try to be brief. I know that the Court has been here longer than I have, and I'm tried, and I'm sure Mr. Terry is also. So, we won't take a lot of time.

The State, though, if it please the Court, does not concede and we would argue otherwise as to pursuing inconsistent theories. The theory in Housler was and is that he was a lookout. He was a participant, but he was a lookout.

[286] The proof in the Housler case was—and the State's position was and is—that Mathews was the shooter. We've never varied from that. An inconsistent theory would be to say first that Mathews was the shooter and now come in and say, no, Housler is the shooter.

And let me give you an example of what I'm talking about: Suppose the State has always felt that everybody involved was not apprehended. That there are still others that have not been prosecuted. Can we not the find that person, maybe, someday, get another statement, and maybe get more evidence and bring that person to trial, and have it argued that we cannot prosecute this person now because we've already prosecuted two people and their name was never mentioned? That would not be so. Surely we could.

So, General Carney said yes, the evidence in this case points to [287] this one man, and it did. It pointed to Mathews. But evidence against Housler would have been inadmissable in the Mathews trial.

Housler's statement could not have been admitted. Other statements he made to third parties could not have been admitted. The State could not have put on evidence against Housler in the Mathews trial unless it was also evidence against Mathews.

So, the State does not concede that. And I know Your Honor has said otherwise, but I respectfully disagree. I do not see two different theories. I see one theory.

THE COURT: I understand that you say—

MR. RADFORD: All right, sir.

THE COURT: —that it's not inconsistent. Maybe I should try to not use a double negative there understand that you say that it is consistent that Mr. Mathews was the [288] sole shooter—

MR. RADFORD: Yes, sir.

THE COURT: —but that Mr. Housler was a culpable criminal?

MR. RADFORD: Yes, sir.

THE COURT: But, Mr. Radford, the only conclusion that anyone could draw from the prosecution of Mr. Mathews was that the State's theory in the Mathews trial was more than he was the lone shooter it was that he was the lone actor.

MR. RADFORD: Well, if it please the Court, I can't take exception to that, because I didn't prosecute the case—

THE COURT: Right.

MR. RADFORD: —and don't know what they're thinking.

THE COURT: Right.

MR. RADFORD: But I know the case I put on was certainly not inconsistent with Mr. Mathews being the shooter. And I—

THE COURT: Well, I don't [289] think it's—I don't think that's what Mr. Terry's complaining about that—I don't think he's saying that the Housler theory was inconsistent with the Mathews being the lone shooter. I think he's saying that the Housler prosecution was inconsistent with the State's theory in Mathews that Mathews was the lone actor.

MR. RADFORD: Then let me give you this example, hypothetical, and ask the Court to consider this: Suppose that

a store is robbed down here next week and two people are killed, and there is one person that's a very strong suspect, and that's the only one we know about.

And he's prosecuted as the lone—as the only one that did. And then later we find out that there are two other people. Are we prohibited under Mr. Terry's theory of prosecuting these two other people because we took a case to the jury and said this guy acted alone?

APPENDIX M - Trial Court Findings, *Housler*, Post-Trial

IN THE CIRCUIT COURT
OF THE 19TH JUDICIAL CIRCUIT
In AND FOR MONTGOMERY COUNTY, TENNESSEE
CRIMINAL DIVISION

CASE NO. 39217
The Honorable John H. Gasaway, III

STATE OF TENNESSEE,

Plaintiff,

-vs-

DAVID HOUSLER,

Defendant.

July 8, 2003

APPEARANCES:

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[2] GENERAL BIEBER: Your Honor, this is not a presentation. It is an inquiry. We have tried several times to reach General Radford on the Housler matter. He has not returned our calls. Has he called the Court's secretary to advise the Court of anything on this case?

THE COURT:This afternoon Ms. Helper, Kim Helper, from the Attorney General's Office will appear on behalf of the government to argue a motion with Defense Counsel regarding the state of the record at the appellate level. So, it's my understanding Ms. Helper and Mr. Radford have been in touch with one another, and he's not expected to be here, and they're all in—

GENERAL BIEBER: And I'm sorry, that's prompted one more question.

THE COURT: Yeah.

GENERAL BIEBER: Would we expect Ms. Terry at 1:30 on the Roybal [3] matters as well?

THE COURT: Yes. And I want to talk—I want to have a conference about management.

(WHEREUPON, other court matters were taken up, after which the following proceedings were had:)

THE COURT: Ms. Gore, Ms. Helper, are you all ready in the matter of Housler, David Housler?

MS. GORE: Yes, sir.

GENERAL HELPER: Yes, sir.

THE COURT: You all can just be seated over here at this counsel table.

All right. This is the matter of State versus David Gene Housler under docket number 39217. The matter is before the Court on the Defendant's motion. Mr. Housler is not present. It's the Court's understanding that he was not transported at

the request of the Defendant and Defense Counsel; is that correct?

[4] MS. GORE: Yes, Your Honor.

THE COURT: And are you ready to proceed on your motion?

MS. GORE: Yes, Your Honor.

THE COURT: Is the State ready to proceed?

GENERAL HELPER: Yes, sir.

THE COURT: All right. Ms. Gore.

MS. GORE: Good afternoon, Judge. I'm Stephanie Gore here representing David Housler. Thank you for hearing this matter.

We're here today requesting for correction or modification of the record pursuant to Tennessee Rules of Appellate Procedure 24(e). We have submitted a proposed order to Your Honor with some cases that we are relying on.

The State has filed a response to our request. As noted in our reply the State's response was the first time that they have ever objected to our request that the Housler record be supplemented with certified transcripts [5] of the Matthews trial.

Really, what I believe happened, in a nutshell, is that when we filed Defendant's brief—Appellant's brief on December 20th we filed with the Court—we had—Your Honor had ordered that the. Matthews transcript be transcribed for the Housler trial. And we had a copy of the Matthews transcript which we used throughout pretrial proceedings, trial, posttrial proceedings.

Excerpts of that transcript were used numerous times throughout all of those proceedings. Witnesses were put on the stand. The transcript from Matthews was either read to

them or given to them directly; General Garrett, General Carney, Agent Puckett. The information in those transcripts and the transcripts themselves were part of the Housler trial proceedings.

When we filed Appellate's brief on December 20th we, as an appendix, filed all the volumes of the [6] Matthews transcript that we had, which we identified to the Court of Criminal Appeals as a copy. It was not a certified copy.

We also—we did not give a copy of the entire transcript to the State, of course. They were able to check that out with the record.

And so, basically after the fact, realizing that the Matthew's transcripts had never been certified we asked the court to direct this Court to certify the Matthews transcript so that it would be a certified transcript that they were reviewing. I believe that Your Honor has been since sent the order, the final order, denying our request from the Court of Criminal Appeals.

Basically, whether or not the court would have looked at those transcripts had we never raised the issue that they weren't certified, I can never tell you.

I know that I've spoken to the [7] lawyer on the Smith v Grouse case, which we've used throughout these proceedings, we believe is directly on point. And she informed me that she put different transcripts—excerpts of transcripts in her brief to the Supreme Court. They weren't certified; the issue never came up; so, in retrospect I look at myself and I think if I'd never even brought this up we might not even be here today.

But in looking at that what we're asking the Court to do is to certify the Matthews transcript and make them a part of the—as we feel they already are a part of the—Housler record.

This Court is in a very special position because you sat on both trials. And we gave you a copy of our brief that we filed. And in that we have a statement from the Court, which says the Court recognizes that the prosecution of Courtney Matthews and the prosecution of David Housler by the [8] State was on different theories.

THE COURT: Wahoo. Let's don't read so fast.

MS. GORE: Oh, I'm sorry.

THE COURT: That's all right. Go ahead.

MS. GORE I'll start again. Recognizes that the prosecution of Courtney Matthews and the prosecution of David Housler by the State was on different theories; dot, dot, dot, but, Mr. Radford, the only conclusion that anyone could draw from the prosecution in Mr. Matthews was that the State's theory in Matthews trial was more than he was the loan shooter. It was that he was the loan actor.

This is Circuit Judge H. Gasaway, trial judge, Taco Bell one and Taco Bell. That's in the David Housler transcript, April 21, 2000, pages 279 through 289, and it's within the appendix volume eight.

In the State's response today to why this Court should not grant our [9] request they rely on the order from the Court of Criminal Appeals saying its been denied so you can't go there. We respectfully submit that that's what the rule accords is that this Court does not lose that jurisdiction. This Court has the right and has the responsibility to make sure that the record accurately portrays what occurred in the trial court and accurately portrays what was in the mind of Your Honor as you are rendering your decisions on our pretrial motions, our trial motions and our posttrial motions.

The State also in its response says that the Matthews transcript was not part of the record, the Housler record. That's not true. The transcript was part of our record.The

transcript was not certified. I don't even—I don't know if, to tell you the truth, since all this it's been certified. I don't know where it is on appeal. I know on Matthews behalf it's [10] probably better that it never gets certified and it stays dormant.

The next point that the State makes is that the Defendant's brief was filed at the appellate court on December 20th, yet we didn't move to supplement the record with the Matthews transcript until February 27th.

The Court of Criminal Appeals had the uncertified transcript of the Matthews record. It's not like we're just now going oops, hey, wait a minute; we want to bring in this whole new thing. That's not correct. They've had the entire—every single solitary volume of the Matthews transcript was filed on December 20, 2002, same time the brief was filed, and the State has had access to that uncertified transcript since that time.

The transcript was not made an exhibit at the motion for new trial. And they offer State V Johnson in support of this contention. State V Johnson, I don't know whether or not [11] Your Honor is familiar with the case, but it dealt specifically with the search warrant. It is not applicable to this situation whatsoever.

Search warrants are distinct. The specific rule is that a search warrant must be returned to the clerk of the court. That was not done in this case. And when it went before the Court of Criminal Appeals, the Court of Criminal Appeals was really concerned about the accuracy of the document.

That's basically—in this situation we're not—there's no contesting that the Matthews document is not—that the Matthews transcript is not accurate. It's just not certified.

We have offered to Your Honor, and I gave copies to the State earlier this afternoon, Johnson and Johnson V William

E. Hardin, 926 SW2d, 236, 1996, Tennessee Supreme Court. The Tennessee Rules of Appellate Procedure 24 was discussed throughout this case. In this case the Supreme Court reversed the [12] judgment of the Appellate Court and prdered a new trial.

The Plaintiffs in this case had requested permission under rule 24(e) to supplement the record with certified portions of the transcript already contained in the technical record.

The Plaintiffs Counsel had already okayed the record on appeal without the transcripts being included and then realized that the transcripts were not—the certified transcripts were not included in the record and requested permission to supplement the record.

The Court of Appeals denied the motion without prejudice noting that the trial court must order certification and prove supplementation of the record.

The Plaintiffs then went to the trial court, as we are here, requesting just that. The Plaintiffs then renewed their motion to supplement [13] the record and attach the trial court's order and the certification. The Court of Criminal Appeals still denied their motion to supplement the record.

In the end the Tennessee Supreme Court reversed the Court of Appeals and State's trial judge's order: Supplementing a record is sufficient to place the matter before the Appellate Court absent extraordinary circumstances an appellate court may not ignore matters that the trial judge has ordered included.

The trial judge certified and approved the portion of the transcript provided by the Plaintiffs and ordered supplementation of the record; therefore, it reversed the Court of Appeals order denying Plaintiffs motion to supplement the record and dismissing the appeal.

The sole purpose of rule 24 is to make sure that the record

conveys true and accurate proceedings so that the proceedings are efficient, so that [14] the proceedings are just and fair.

And we're requesting that Your Honor enter our order finding that the record does not accurately disclose the factual basis for Mr. Housler's argument and the courts decisions without supplementation and certification of the trial transcript of Courtney Matthews will not convey a complete and fair and accurate record. That's all I have. Thank you.

THE COURT: Thank you, Ms. Gore. Ms. Helper.

GENERAL HELPER: Your Honor, thank you. For the record I'm Assistant Attorney General Kim Helper on behalf of the State. I just wanted to clarify: General Radford, who had tried the case before this Court, to my understanding filed a notice of cross-designation with this Court for the limited purpose of this hearing. So, I hope the Court is in receipt of that, and I then filed a notice of appearance strictly because this is an appellate issue.

[15] THE COURT: You are correct. He did file that document.

GENERAL HELPER: Thank you. And if I just might briefly thank you for your understanding with my scheduling problem this morning and setting this for this afternoon.

Your Honor, I think that the state can respond point by point to the arguments made by Ms. Gore before you. To the extent that she suggests that this is the first time that the State has objected to the supplementation of the record, I think, perhaps, what we have here is a fundamental difference in the approach to handling matters on appeal.

Generally when there is a request to file a supplementation of the record in the Court of Criminal Appeals there is usually a telephone call from the attorney asking whether the State has any objection or not. To my knowledge that did not happen in this case; however it is not our office's [16]

practice to respond then once that matter is placed before the Court of Criminal Appeals.

We did respond in this case with a letter that was sent to this Court requesting a response based on two or three grounds. Quite frankly, I think the State's primary position, with all due respect to this Court, is that the Court of Criminal Appeals has already said no, that this record is not properly includable under Tennessee Rule of Appellate Procedure 24(e).

Accordingly to then, after receiving an unfavorable ruling from the Court of Criminal Appeals, to come back to this Court at this time and ask, in affect, for this Court to overrule the Court of Criminal Appeals, the State does have some concerns about the jurisdiction of this Court to do so at this time.

I think one of the cases that Counsel stated was the Johnson case. And I think very clearly in there the [17] Court noted that, in affect, the record should first be—supplementation of the record should first be raised in the trial court, and unfortunately that did not happen in this case. It happened in reverse. And, accordingly, because of that the State would suggest that this Court does not now have jurisdiction to supplement the record when the Court of Criminal Appeals has already said no.

Secondly—and this goes to the Johnson case, which the State cited—I think it is abundantly clear. I have read the Housler record that there are references made throughout the record to the Matthews trial; however, and I did not see - and I specifically looked for it - any occasion whatsoever where any transcripts were ever introduced as an exhibit during the Housler trial or during the motion for new trial.

And there was, I believe, extensive argument during the motion for new trial on what Defendant raised as a [18] prosecutorial misconduct issue under the different theories.

But at no time did the State - myself in going through the record—find any indication where that record was ever introduced or any portions of that record were introduced as any kind of an exhibit for review by the Appellate Court.

While Ms. Gore suggests that she has filed as an appendix to her brief the uncertified transcript, Your Honor, the State would suggest to you that that is not a record that the Court of Criminal Appeals can consider. That is not something that is properly before the Court of Criminal Appeals; accordingly that, I believe, is why the Defendant at this time is now moving to supplement with that record.

However, while you may have had knowledge of the prior proceedings there is absolutely nothing in the record where any part of that transcript comes in as any kind of exhibit.

[19] And while Ms. Gore talks about impeachment evidence from the Matthew trial coming in during the Housler trial I would just suggest to you that that happens frequently during trials, and generally those statements and such do not come in as exhibits and generally there is not a supplementation later so that someone can see what the impeaching material was.

So, accordingly because it never came in as any kind of an exhibit during the Housler trial the State would suggest to you that it is not now properly includable as part of the Housler record on appeal in the Court of Criminal Appeals.

And, finally, and I think I would just conclude by saying that, again—and this is out of the Johnson case—that rule 24(e) does not comple—actually it's out of the Court of Criminal Appeals order in this case where the court said that rule 24(e) does not contemplate supplementing the [20] record with the record of the trial court for a completely different defendant.

And that is what you have here is that this is not the record from the David Housler trial; this is not missing transcripts

from the David Housler trial; this is not missing pleadings from the David Housler trial; in fact, this is the record from another trial that this Defendant is now trying to put before this Court, and the Court 'of Criminal Appeals has recognized that that is not the purpose of rule 24(e).

If there are any questions, Your Honor, I'd be happy to answer them, but at this point the State would suggest that this is an improper or inappropriate motion at this time because the Court of Criminal Appeals has already ruled.

THE COURT: Thank you, Ms. Helper.

GENERAL HELPER: Thank you.

THE COURT: Ms. Gore.

[21] MS. GORE: Just one moment, Your Honor.

I will just address a couple of the points made by Ms. Helper. This is the first time that the State's objected. We don't—it's not our practice to call the Appellee and ask if we can file a motion to supplement the record. We may call the Appellee and ask if they object to us filing a motion to continue or a motion of extension of time but not a motion to supplement the record.

They received the motion to supplement the record and they never responded to that motion. In fact, because we filed that motion to supplement the record, I believe Your Honor has in one of the State's exhibits their motion for extension of time to file the Appellee's brief. And in one of the paragraphs in the—in Ms. Helper's affidavit is that the State recognizes that the Housler brief focuses primarily on comparison of the [22] Housler trial and the Matthews trial.

And whether or not Defendant's Counsel, once again, should have made something an exhibit that was throughout the trial, pre and post, evidence brought before this Court and made a part of the record, whether or not we should have asked at the end of our motion for new trial that the transcript

of Matthews be certified - because it wasn't at that time - no one objected from the State during trial that we were using an uncertified transcript. Never objected.'

So, whether or not Defendant's Counsel has messed up one more time in this case does not preclude this Court under the rules of correcting, modifying, supplementing this record so that Mr. Housler doesn't have to, way on down the line, in some postconviction hearing because Defendant's Counsel screwed up and should have made this Court certify the Matthews transcript and make it an exhibit, it's not a [23] reason to deny this request.

And our case of Johnson V Hardin is very much on point in this, because the Court of Appeals denied—just like in this situation they denied Counsel's request to supplement. Then the Defendant's Counsel went to the trial court. The trial court gave them relief. They went back to the Court of Appeals—and the Court of Appeals again denied their request even after—ignored the trial court's order. And the Supreme Court reversed it.

So, I submit there's probably nothing—I submit that Housler is probably a case of first impression. There's a lot of things that have happened in this case that have not been reviewed, have not been even opined to this date.

But the point is that if the Matthews exhibit was never—Matthews transcript never made an exhibit it was introduced into evidence, it is part of the Housler record, and in order for [24] Housler to receive a fair record and a fair review from this Court of Criminal Appeals, just as Your Honor had in your mind, because you sat on the Matthews trial, you listened to everything and you listened in the Housler trial, you have that benefit of that knowledge, the Court of Criminal Appeals has to have the benefit of that knowledge in order to make a fair—render a fair decision in this matter.

And I ask Your Honor to, please, read Johnson V Hardin if you haven't had a chance to. And we've submitted a case, State of Tennessee versus Hastings, where on page six -page four of six of the copy that I've given Your Honor states that the Tennessee Supreme Court addressed the affect of non-compliance with the technical aspects of the rules of appellate procedure in Johnson V Hardin. The same case we've submitted to Your Honor.

And it states that's the [25] overall intent of the rules is to allow cases to be resolved on their merits. A court's construction and application of the rules should further that intent and should enhance not impede the search for justice.

If Your Honor has any questions I'll be happy to answer them.

THE COURT: No.

MS. GORE: Thank you.

THE COURT: The Defendant is before the Court asking this Court to enter an order certifying the accuracy of the trial transcription in the case of State versus Courtney Matthews, a case tried in Montgomery County under case number 33791.

Moveover, the Defendant seeks to have this Court order the trial transcription of the Matthews trial as a supplement in the record of State versus Housler.

The Attorney General's Office on behalf of the State objects on the basis that this Court doesn't have [26] jurisdiction to supplement the trial record because the matter—the Housler record has already been—the direct appeal taken by Housler has already—is already lodged in the Court of Criminal Appeals and this Trial Court now cannot order a supplement to the Housler record as requested by the Defendant.

And the State relies on an order which was entered by the Court of Criminal Appeals and filed on April 30, 2003. And

I'm going to read in pertinent part from that order. And I'm—at paragraph two.

The order says: After careful consideration of appellant's request—and that is, of course, Housler's request that the Housler record be supplemented with the trial transcription of the Matthews case—this court finds that the motion to supplement must be denied. Appellant asserts in his motion that the transcripts from the Matthews trial have [27] not been certified by the Trial Court.

And that's what Ms. Gore was eluding to; the Appellant himself brought it to the attention—I suppose that's what happened. The Appellant himself brought it to the attention of the Court of Criminal Appeals that the transcriptions in the Matthews case had not been certified by the Court although, as Ms. Gore says, they were used repeatedly in the Housler trial.

The sentence goes on and says: Appellant asserts in his motion that the transcripts from the Matthews trial have not been certified by the Trial Court because Matthews motion for new trial has been pending before the Montgomery County Circuit Court since 1996; although, it is perplexing to this court as to why a motion for new trial has been pending for such an extended period in the trial court we have no jurisdiction in the Matthews matter at this time.

Well, the Matthews case is in [28] the posture that it's in because, I'm sure, Mr. Matthews has never really wanted a new trial. He was sentenced to life without the possibility of parole and was sentenced four times for the four deaths at the Taco Bell Restaurant. And, I dare say, he probably—the last thing he wants is a new trial giving the State an opportunity again to seek the death penalty. But that's really just supposition on the part of the Defendant.

And even though the Defendant Matthews has never prosecuted a motion for new trial neither has the State sought

to have this Court enter an order denying a motion for new trial, which was filed by the Defendant but never prosecuted.

But be that as it may, that is the predicate, apparently, for the Court of Criminal Appeals ruling and it's ordered that the Court of Criminal Appeals cannot rely—excuse me; that [29] the Court of Criminal Appeals has no jurisdiction in the Matthews matter. Well, it has no jurisdiction because Matthews never sought a direct appeal.

Then the Court of Criminal appeals goes on to say: Moreover this court cannot rely on an uncertified transcript in rendering a decision in this matter.

So, the Court of Criminal Appeals says Matthews is not before the Court of Criminal Appeals. The Court of Criminal Appeals cannot rely on an uncertified transcription. And then the order goes on to say: Rule 24(e) of the Tennessee Rules of Appellate Procedure governs corrections and modifications of the record. Rule 24(e) does not contemplate supplementing the record on appeal with the record of a trial court for a completely different defendant.

Well, it doesn't really matter what this Court thinks that the—what the intent of rule 24(e) of the Tennessee Rules of Appellate Procedure [30] mean. This Court is not the Court that Flakes that determination. That is the Court of Criminal Appeals. But I know this: Every defendant has a constitutional right under the due process clause and equal protection clause and case law that you could stack up for miles, every defendant has a right to have a meaningful review of every constitutional issue that the defendant wants to raise.

And it has been a consistent claim on the part of the Defendant Housler that the appellate courts of this state must review whether or not the State can offer two different theories for the same crime.

This Court has said—and I don't think that it has really has been objected to by the State, perhaps it—perhaps, but this Court has said repeatedly, and still now believes, that you cannot read the Matthews transcription, you could not have sat through the trial and believed any other [31] thing than the State of Tennessee believed that Courtney B. Matthews acted alone in the robbery and the killing of the people employed at the Taco Bell Restaurant.

That was the theory of the State before the trial; it was the theory of the State at the trial; it was the only conclusion that a reasonable mind could draw: That the State of Tennessee believed that Courtney B. Matthews acted alone in the robbery and he killing of the victims of the Taco Bell Restaurant.

Thereafter the State indicted and prosecuted David Housler. nd the tate offered a theory that David Housler acted in consort with Courtney Matthews; that he was part—that he helped plan it; that he participated in it and that he engaged in the robbery in some sort of supporting roll.

And the Defendant, Housler, has always said and always maintained that the State of Tennessee should not [32] be able to with a straight face in front of two different juries argue two different theories that cannot be—that are mutually exclusive of one another.

And it has always been this Court's desire for this Court—for this State through its appellate courts to address the issue: Can the State do that? Is that legal?

Only the appellate courts can address that, and they ought to address it. And if there was some negligence on the part of the Defense Counsel to get the Matthews transcription certified and offered as an exhibit in the Housler trial, if that technical failure on the part of the Defense Counsel is going to prevent the Defendant Housler from having his constitutional right to have his direct appeal be a meaningful review

of every constitutional issue that he claims, then I assure you we will see it later on a postconviction relief matter.

[33] So, the Court is uncertain as to whether or not it can at this point in time order a certification or actually—strike that. This Court is uncertain whether it can now certify the accuracy of the trial transcription in the case of the State versus Matthews, and it is uncertain as to whether or not it can order that trial transcription as a supplement to the Housler record.

Ms. Helper 'says that in the face of this order from the Court of Criminal Appeals I can't do it. Ms. Gore says that on the strength and the authority of Johnson versus Hardin that I can do it.

I most respectfully believe that the issue of the—of whether or not the State can prosecute two different people at two different trials on mutually exclusive theories must be addressed by the Appellate Court.

And with all respect, and considering the order from the Court of Criminal Appeals as a directive that I [34] would never knowingly defy, the Court believes that it does have the authority under Johnson versus Hardin to now certify the accuracy of the Matthews transcription and to supplement the record of the Housler record so that in the direct appeal process rather than a later postconviction relief procedure this issue can be addressed by the Appellate Court and the Housler Defendant, now Appellate, can have, through his right of due process and tqual protection, a meaningful review of this issue along with all the other issues that he has submitted and lodged with the Court of Criminal Appeals.

The order submitted by Mr. Housler is now being signed by the Court as submitted.

This is—it is the responsibility of the Defendant to submit the trial transcription in the Matthews case to this Court for

certification, whereupon the clerk of the court is ordered to submit this as a [35] supplement to the Housler record. That's all. Unless I overlooked something.

MS. GORE: Thank you, Judge. Can I get a copy of that order?

THE COURT: Sure. They'll process it and you can—

MS. GORE: I'll go down later, since I'm here on another matter.

THE COURT: Thank you very much.

MS. GORE: Thank you, Judge.

GENERAL HELPER: Thank you.

THE COURT: Thank you.

(WHEREUPON, no further matters were heard in this cause on this day.)

[36] I the undersigned, RITA MORETTI SCRUGGS, Official Substitute Court Reporter for the 19th Judicial District of the State of Tennessee, do hereby certify that the foregoing is a true, accurate and complete transcript, to the best of my knowledge and ability of the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Circuit Court of Montgomery County, Tennessee on July 8, 2003.

I do further certify that I am neither attorney for, nor related to any party to this cause, nor do I have any financial interest in this action.

July 10, 2003

/s/ Rita Moretti Scruggs
RITA MORETTI SCRUGGS
official substitute court reporter

APPENDIX N - Witnesses, *Housler* and *Mathews*

Mathews

State's Witnesses

6/10/96
Ward, Carl
Hinkle , Lt. Richard

6/11/96
Hinkle Detective Richard
Ballard, Jr., John Arthur
Blakely, Officer Tony
Brown, Officer Richard
Butts, Florence
Vanlugen Emma
Woodrow, Sandra
Campbell, Lori
Depto, Shawn
Depto, John

6/12/96
Rose, David Lee
McCuiston, Donnie Ray
Howell, David
Dickson, Fitz
Cierlik, Karen Sue
West, Allan
Kellett, Deann
Peghee, Shawn
Holford, Tonia Renee
Cooper, Patrick

6/13/96
Bowen, James
Walker, Jelain

6/14/96
Ward, Shawntea
Ceruti, Allen

Hunt, John
Castle, Cheryl Johnson,
Deane Guerrieri, Richard
Johnson, Deane
Ward, Phillip
Hall, Larry
Phillips, Eugene
Clark, Agent Anthony
Phillips, Brad

6/15/96
Evans, Sandy Poltorak
Royse, Don

6/17/96
Harlan, Dr. Charles
Royse, Robert Daniel
(recalled)
Harlean, Dr. Charles

State's Rebuttal - 6/20/96
Leverett, Jerry
Pellino, Kim
Ortiz, Hector
King, Deronda
Bush, Charles

Tansil, Bryant
Wall, Christopher
Antaya, Michelle
French, William
Maurizzio, Yowanda
Sanford, Frankie
Phinessee, James
Underwood, Sharie
Ward Hooks, Shawntea

Defense Witnesses -
Mathews

6/18/96
Underwood, Shaire
Culbert, Candy
Converse, Jerome
Grimes, Jerry L.
Dellinger, David
Hunt, Officer John
Holloway, Jon
Fortner, Agent
Puckett, Agent
Charvis, Alan
Evans, Agent
Phillips, Hoyt

6/19/96
Nichols, Lesa
Foley, Denis Allean
Box, Shane
Underwood, Sherry
Dickinson, Jacqueline
Reber, Sandra

6/20/96
Housler, David
Hudspeth, Billy

State's Witnesses

11/12/97 A & B
Ballard, John Arthur, Jr.
Harlan, Charles Warren
Blarkely, Tony Detective
Underwood, Sherry
Rose, David Lee
Evans, Sandra Poltorak

11/13/97 A & B
Hunt, John William
Harll, Larry Edward
Phillips, Hoyt Eugene
Miller, Michael
Gaddes, Lopez
Cark, Anthony
Ester, Christopher
Ward, Carl

11/14/97 A & B
Gill, Orlando
Corley, Kendra
Ortiz, Hector
Pellino, Michael
Bowen, James
Underhill, Larry
Carr, Jason
Underill, Larry

11/15/ A&B
Carney, John
Puckett, Jeff
Clark, Andy Agent
Walker, Jelaine
Hudspeth, Billy

11/17/97
Garrett, Steven Leon
Smith, Carter
Cromartie, Damien
Char[illegible], Alan Detective
Dickinson, Jacqueline p. 168

11/18/97
Darwish, Melanie Lewis,
Vincent

State Rebuttal
Eastland, Robert
Dawson, Robert
Puckett, Jeff

Jolly, Mark Adam
Smith, James

Defendant's Witnesses -
Housler

11/18/97
Shawn Depto
Peghee, Shawn
Rivaf, Deann Kellett
Wall, Christopher
Ward, Shawntea
Skagge, Melanie Grier
Ballard, John Arthur
Cooper, Patrick
Antaya, Michell
Tansil, Bryant
Maurizzi, Yowanda
Sanford, Frankie
Hooks, Michael A.
Buck, Alicia
Ceruti, Allen

11/19/97
Hunt, John Officer
Puckett, Jeff
Corley, Kendra
Ulangca, Sulyn
Brown, Charlie
Housler, David

11/20/97
Bush, Charles

Defendant Surrebuttal
Garrett, Steven

APPENDIX O - Opinion, Tenn. Court of Criminal Appeals

COURT OF CRIMINAL APPEALS OF TENNESSEE,
AT NASHVILLE

[Filed February 27, 2004.]

No. M2002-00419-CCA-R3-CD.

STATE OF TENNESSEE,

Plaintiff,

v.

DAVID HOUSLER,

Defendant.

October 14, 2003 Session

Direct Appeal from the Circuit Court for
Montgomery County, No. 39217,
John H. Gasaway, III, Judge

Judgment of the Circuit Court Affirmed.

Michael E. Terry, Terry & Gore, Nashville, Tennessee, for the Appellant, David G. Housler.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Kim R. Helper, Assistant Attorney General; Robert "Gus" Radford, District Attorney General Pro Tem, for the Appellee, State of Tennessee.

David G. Hayes, J., delivered the opinion of the court, in which David H. Welles and Jerry L. Smith, JJ., joined.

OPINION

DAVID G. HAYES, *Judge*.

A Montgomery County jury convicted the Appellant, David G. Housler, of four counts of felony murder. Housler's convictions stem from the robbery of a Clarksville Taco Bell and the execution-style murders of four of its employees. Following a sentencing hearing, the trial court imposed four consecutive lifesentences. Housler appeals, presenting the following issues for our review:

(1) Whether his confessions were properly admitted into evidence when the State and the trial court knew the confessions were false and unreliable;

(2) Whether the State committed prosecutorial misconduct by using the recanted testimony of Robert Eastland, Robert Dawson, and Michael Miller and by failing to inform defense counsel or the trial court that Jeremy Thompson had recanted his statement;

(3) Whether he is entitled to a new trial based upon the newly recanted testimony of Larry[1] Underhill;

(4) Whether the trial court erred in denying a new trial when a juror fell asleep during the trial;

(5) Whether the Mathews time-line proves his innocence;

(6) Whether the State prosecuted Housler and Courtney Mathews[2] under inconsistent theories; and

(7) Whether consecutive sentencing was proper.

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[1] The Appellant refers to the witness as William Underhill. Because the witness stated his name as "Larry G. Underhill" and "Larry Gene Underhill, Senior," we will use the name Larry, when appropriate.

[2] On January 12, 1996, the State moved to join the indictments of the Appellant and Courtney Mathews for trial. However, no disposition of this motion is apparent from the record.

After review, we find no error of law requiring reversal. Accordingly, we affirm Housler's convictions and the imposition of four consecutive life sentences.

Factual Background

On January 30, 1994, Kevin Campbell, Angela Wyatt, Patricia Price, and Marcia Klopp were working the early morning shift at a Taco Bell in Clarksville. According to John Ballard, a shift manager at the Taco Bell, when he stopped by the drive-thru window at approximately 1:45 a.m., the employees were engaged in normal closing activities. Klopp told Ballard that they had been very busy and had been unable to close the drive-thru window until 1:30 a.m.

When Ballard arrived later that morning at approximately 7:20 or 7:25 a.m., he noticed that the employees' cars were still in the parking lot. After unlocking the main entrance, Ballard entered the Taco Bell and saw "a dirty line and a body towards the back end of the building in the dish area." Ballard returned to his vehicle and telephoned the police. He then circled the Taco Bell and noticed cardboard in the drive-thru window.

Detective Tony Blakely, a patrol officer at the time, was the first to arrive on the scene. Blakely, along with another officer, checked the building to make sure no one was inside. Blakely first checked the men's restroom area, where he found the body of Kevin Campbell. The second victim, Angela Wyatt, was nearby under a stainless steel sink. A few feet away from Wyatt's body was the body of the third victim, Patricia Price. Blakely then exited the restroom area and proceeded to the office of the restaurant. Directly outside the office, he discovered the body of the fourth victim, Marcia Klopp. All of the victims were dead from multiple gunshot wounds.

Upon further examination of the men's restroom, Blakely observed a disrupted ceiling tile "that looked like it was

moved for opening." The tiles were located approximately "ten steps" from the body of Kevin Campbell. T.B.I. forensic specialist Sandra Poltorack Evans arrived at the Taco Bell to aid in the investigation. Evans later confirmed that fingerprints on the vent near the ceiling tiles belonged to Courtney Mathews. Courtney Mathews was also employed at the Taco Bell and had been working at the restaurant for "approximately ten to fourteen days" prior to the robbery and murders.

The office safe had been broken into, apparently after the dial was shot, and some, but not all, of the safe shelves were disturbed. According to Evans, two different guns, a shotgun and a .9 millimeter, had been used to shoot the safe. Upon a search of the Taco Bell premises, a "Federal two and three quarter inch lead rifle slug shot shell case," an "unfired Federal two and three quarter inch lead rifle slug shot shell," and lead fragments from the slug were found inside. Twenty-four cartridge cases, all fired from a .9 millimeter, were also recovered. Eight bullets that were also found came from the same .9 millimeter as the cartridge cases. Similarly, bullet fragments recovered during the autopsies of the victims matched the same firearm.

An audit by then team unit manager, Sherry Underwood, revealed that $2,967.68 had been taken from the store. Underwood explained that the paycheck verification report showed that Courtney Mathews clocked in to work at 2:10 p.m. on January 29, 1994, clocked out for a break at 7:39 p.m., clocked back in at 8:12 p.m., and ended his shift at 9:11 p.m. Underwood testified that company policy prohibited entry to the store by anyone once the doors to the restaurant were locked for the evening. The only exception was to open the door to allow an employee to leave. However, Underwood agreed that the policy could be violated by the employees working at the time.

On the day of the murders, David Lee Rose was working maintenance at the McDonald's near 1-24 in Clarksville.

While he was emptying the trash, he discovered .12 gauge shotgun shells, .9 millimeter shells, change in wrappers, a black wallet, and a black leather glove. He also disposed of two half-eaten hamburgers that were in the bag with the other items. Rose took the shells and change home with him. He did not keep the glove or the wallet because there was no money or identification in it. When Rose learned about the murders, he returned the shells to his store manager.

Officer John Hunt of the Clarksville City Police Department searched for evidence "all along the interstate." At the Red River Bridge on 1-24, Hunt, along with Detective Tim Saunders, found "some clothing garments throwed (sic) over the bridge, latex gloves—pieces of latex gloves, a pair of blue pants, [and] a Burger King bag." One of the clothing items was a black jacket. On the jacket was the blood of the victim Kevin Campbell, which was confirmed by DNA analysis. Also, plastic fragments taken from the coat were similar to the plastic blown off the safe.

Following police investigation, Courtney Mathews was developed as a suspect in the robbery and murders. A search of Mathews' car was conducted, during which a bowling bag containing $2,576 and a woman's purse containing several credit cards in the names of Courtney Mathews and Kendra Corley were found. T.B.I. Agent Anthony Clark searched Mathews' home on Ryder Avenue. On February 2, 1994, Clark recovered several bullet fragments and unspent rounds from Mathews' home. On February 5th, a .25 caliber round was found outside Mathews' home. T.B.I. forensic scientist Dan Royse testified that a cartridge case and bullet fragments recovered from Mathews' home were fired from the same .9 millimeter as the cartridges and bullets discovered inside the Taco Bell and the bullet fragments recovered from the victims during their autopsies. After comparing the shotgun shell remnants from the Taco Bell to the ammunition recovered at McDonald's, Royse stated that they were all the same type of

ammunition. Believing that Mathews obtained his shotgun from Shawn Depto in Pennsylvania, Royse compared the shells provided by Depto and determined that the shells had the same markings as those recovered at McDonald's and the one from Taco Bell. On November 21, 1995, a plastic bag containing shells and parts of a Winchester shotgun was found behind Mathews' home. After reassembling the shotgun, Royse's testing revealed that the Taco Bell shell was fired from the same gun. The shells provided by Depto and recovered from McDonald's also matched.

Jelaine Walker worked at Taco Bell with Mathews. She testified that Mathews left the Taco Bell around 9:00 p.m. on January 29th. About an hour or so later, Walker observed Mathews "at the trash can that's in the dining room right next to the counter, and he had the door of the can open and he was knelt down at the trash can." Mathews said to Walker, "I am gone, you don't see me."

At the time of the murders, Carl and Shawntea Ward shared the home on Ryder Avenue with Mathews. According to Carl Ward, Mathews arrived home about 7:30 p.m. on the night before the murders and went into his room. Ward observed Mathews break down a shotgun and get a .9 millimeter and a .22 or .25 and place them in "a little black book bag, [with] shells and everything and was preparing to leave." Mathews also took a bowling bag and some white latex gloves with him. Ward handled the .9 millimeter gun and then wiped it down pursuant to Mathews' instructions. Ward testified that, when Mathews left the house, "He had clothes on top of clothes. From what I remember, he had two layers of clothes on. He had on like Miami Hurricane colors, sweat suit, jogging suit. And then he had on black pants and a white shirt with a tie and a black three-quarter coat." As he left, Mathews stated that they would not see the clothes again. Ward identified the coat found under the Red River Bridge as the one that Mathews was wearing that night. According to

Ward, on January 30th, Super Bowl Sunday, Mathews cried. The following Wednesday, Mathews attempted suicide. On this evening, Mathews told Ward, "I ain't shit. I killed four people." Between the Sunday of the murders and the Wednesday Mathews attempted suicide, he conveyed to Shawntea Ward the following account of events:

Well, he told me that whoever did it, they went into the Taco Bell before it closed. They went into the men's bathroom and climbed into the ceiling, waited until the store closed. They came down and it is not normal for all the workers to be in one area and he said they killed two people in the front of the store and two in the back. And then they proceeded to take the money and he said they didn't get all the money because the drop box was still at the drive-thru window and it had a clipboard sitting over the top of it, but you could see the money sticking out and he said they only got into three compartments of the safe, which it was six compartments.

Shawn Peghee worked with Courtney Mathews at Fort Campbell in the mailroom. On the Friday before the murders, Mathews asked Peghee questions about the safe in the mailroom and whether one would be able to get inside the safe if he shot it. According to Peghee, when Mathews was getting ready to leave the mailroom, "he sort of looked back at me with a smile on his face, sort of a smirk and he said something big was going to happen that weekend."

During the time that Mathews worked at Taco Bell, he asked Assistant Manager Deann Rivaf if anything was stored in the ceiling. Rivaf also recalled an incident where Mathews was supposed to be cleaning the men's restroom, but the supplies were outside the door.

In May of 1993, Fitz Dickson, who had known Mathews for eleven years, purchased a .9 millimeter gun for Mathews. When Dickson saw Mathews on the day of the robbery and murders, Mathews was "crying and depressed."

During the investigation, Attorney General John Carney was informed that the Appellant had information concerning the Taco Bell robbery and murders. On March 21, 1994, the Appellant was interviewed at the Criminal Justice Complex in Clarksville. During this interview with T.B.I. Agent Jeff Puckett, the Appellant admitted to meeting Courtney Mathews at a trailer in Oak Grove, Kentucky on January 21, 1994. He remembered that Mathews said he had a place to rob and "we'll go in and won't leave any witnesses." According to his statement, the Appellant then asked Mathews when this would happen, and Mathews told him to read the papers. He then reported that he encountered Mathews in jail and remembered him from the party at the trailer. According to the Appellant, Mathews stated he committed the Taco Bell murders and giggled. Given the information the Appellant revealed in this interview, including that Mathews talked about "187'ing the employees" or "not leaving any witnesses," Attorney General Carney believed that the Appellant "could possibly be a witness for the State in the case against Courtney Mathews." Discussions ensued with the Appellant's attorney, Larry McMillian. In exchange for the Appellant's cooperation and testimony against Mathews, the Appellant's bond was reduced on an unrelated aggravated robbery charge and the charge was to be reduced to robbery. The Appellant was released on bond and returned to Kentucky.

Carney and Assistant Attorney General Steven Garrett met with the Appellant again on October 11, 1995. Concerns were raised because, contrary to the Appellant's prior statement, Sulyn Ulangca could not provide an alibi for the Appellant on the morning of the robbery and murders. According to Carney, the purpose of this meeting was "[t]o try to clear up I think some inconsistencies in some statements and to confront him with some information that we had and to try to get to the truth as to whether or not he was actually a witness in this case or was he a defendant." During the interview, the Appellant gave a statement reporting the following details.

The Appellant stated that, during a party at the trailer the week before the Super Bowl, Mathews said he was going to rob the place where he worked because he needed the money. The Appellant also stated that "the plan was to go down there on a weekend late at night and tell the manager that he had left behind his billfold or lost his billfold inside the Taco bell and that would be the way to get in[.]" Furthermore, the Appellant stated that "he gassed Courtney Mathews up and he (Mathews) . . . didn't have the balls to go down there and rob the place, but that if he grew them, he (the Appellant) would go with him." Also, Mathews said he was going to "187 them," meaning kill them. On the night before the robbery and murders, the Appellant gave Mathews a ride to the Taco Bell around 11:00 p.m. The Appellant stated Mathews had a .9 millimeter pistol at the time, but he gave varying accounts of its disposal following the commission of the crime. Carney testified that the Appellant stated he was remorseful because "he had encouraged Mathews not to leave any witnesses." Based upon his statements, the Appellant's status changed from witness to suspect because if he acted as a lookout he would be an accomplice and could be charged with murder. Because Carney believed the Appellant was providing necessary information in "dribbles," he allowed him to go home and return the following Monday.

The Appellant was unable to return the following Monday due to car trouble. Ultimately, the Appellant returned on October 19, 1995. On this date, the Appellant entered into a proffer agreement with the State, wherein he would plead guilty to conspiracy to commit murder and robbery and receive an effective fifteen-year sentence, as a Range I standard offender. The negotiated plea was conditioned upon the Appellant's agreement that he would aid the police in their investigation of the Taco Bell robbery and murders by providing truthful testimony. In compliance with this agreement, the Appellant gave another statement, in which the following details were developed. He met Mathews at the trailer in Oak

Grove about a week prior to the murders at Taco Bell. At the party, Mathews, the Appellant, and Charlie Brown talked about crimes each had committed. Mathews brought up the idea of robbing the place where he worked. Mathews said he would go in and leave no witnesses. The Appellant and Brown told Mathews that he (Mathews) would not commit the crime but, if he would, the Appellant would go with him. When the Appellant asked Kevin "Red" Tween if he knew about the plan, Tween responded, "[W]hatever, whenever." Melanie Darwish then approached the Appellant and said she was in for another "Bonnie and Clyde ride." The night of January 29, 1994, Tween told the Appellant to get some ammunition, and the Appellant visited someone called "Hippie Dude." The Appellant drove his white Tracer to Taco Bell, and Darwish drove her red Tempo. When the group left, Tween was wearing a dark blue hooded jacket and blue jeans, and Mathews was wearing a black knee-length jacket. The group stopped at the Minit Mart for beer and cigarettes. On the ride to Taco Bell, Mathews told Tween to get the register, and he would take care of the safe. Upon arriving at the Taco Bell, they pulled up to the Taco Bell drive-thru window. Mathews exited the car and tapped on the window, and a heavyset woman with brown hair came to the window. During this time, the Appellant saw Darwish's car in the mall parking lot. Tween then got out of the car and ran behind the dumpsters. The Appellant decided not to go in because he was fighting with his girlfriend, Sulyn Ulangca, and he pulled up parallel to the main double doors. The Appellant saw Mathews and the woman walk toward the counter area near the bathrooms. After about twenty minutes, he heard ten to fifteen loud pops from the other side of the building, and he then saw Tween run behind the Taco Bell toward the dumpsters. Next, he saw another person exit the Taco Bell and run in the direction of the dumpsters. He then put the car in gear and drove across the bridge. He stated that Darwish drove the getaway car, and he was the lookout. Following a quick

conversation with Tween and Mathews in the Dingo Boot parking lot, the Appellant returned to the trailer. Tween and Darwish arrived at the trailer about thirty minutes later without Mathews. He asked where his thirty percent cut was, and Tween said that Mathews would be over later. Tween also said that Mathews shot them in the head gangster-style. According to the Appellant, he left his car on the road where Jennifer Ellis lived because he thought it would be connected to the murders. It was his understanding that it was later impounded by the police department. The Appellant stated he did not see Mathews again until they met in jail.

The Appellant's statements could not be confirmed by Sulyn Ulangca. When Ulangca returned to Tennessee to confront the Appellant, he did not want to see her and confessed to implicating an innocent person. The Appellant was informed that he had breached the agreement and that the agreement was going to be revoked. The Appellant then ran from the room.

Subsequently, on November 7, 1995, the Appellant was charged with four counts of premeditated murder, four counts of felony murder, and one count of especially aggravated robbery. The State filed a notice of intent to seek the death penalty. The State later withdrew its notice and filed notice of intent to seek life without parole. On September 3, 1997, the State obtained a superseding indictment, which charged only four counts of felony murder. The trial was held from November 12th through the 21st of 1997. Relevant portions of the testimony presented at the Appellant's trial follows.

Michele Antaya testified that, on January 29, 1994, at approximately 11:00 or 11:15 p.m., she stopped at the Taco Bell drive-thru window. According to Antaya, she saw a black male walk from behind the dumpster towards her car. She described him as between five nine and five eleven, stocky, and with a short hairstyle shaved on the sides. She testified that he was wearing a dark jacket with a hood and dark pants.

Yownada Maurizzio went through the Taco Bell drive-thru about 1:10 or 1:15 a.m. on January 30, 1994. She observed a black male speaking with a black female inside the restaurant.

Frankie Sanford testified that he was at the Taco Bell drive-thru about 1:30 a.m. on January 30th. He observed Mathews, dressed in his Taco Bell uniform, inside the restaurant.

Jacqueline Dickinson was eating pancakes at G's Pancake House near the Taco Bell on January 30th. She left G's Pancake House around 2:35 to 2:40 a.m. She stopped at a light in front of the Taco Bell and looked into the restaurant, where she observed a white male at the counter looking towards the Long John Silver's lot next door. According to Dickinson, the man was wearing "a long green jacket that reached past his buttocks" that "had a big hood attached to the back, the same color, and he had on a darker pair of jeans." She described the man as "medium built, around five nine to six foot. . . He had short hair brown military style haircut." She also observed a white vehicle in the parking lot "facing inward towards the building." The car was not in the same position as the white car shown in the crime scene photos, which was a victim's vehicle.

Damien Cromartie was looking for taco sauce on the morning of the murders, and he stopped at the Taco Bell around 3:00 a.m. Heobserved a few vehicles in the parking lot, and a brown or burgundy sedan parked in the Two Rivers Mall parking lot behind the Taco Bell. When he pulled up to the drive-thru window, there was a large piece of cardboard in the window. According to Cromartie, he saw the silhouettes of two, maybe three, people moving around inside the Taco Bell.

Twenty-Third Judicial District Drug Task Force Agent Bill Hudspeth testified that, between 2:00 and 2:30 a.m. on January 30, 1994, he was driving home from Stewart County to

Cheatham County. Near the vicinity of the Taco Bell, he saw a white male run diagonally in front of his car. The male ran from an area behind the Taco Bell across the road towards the muffler shop. Hudspeth described the male as "between five nine and six foot tall. His hair was short, over the ears on the sides and stocky build[.]" According to Hudspeth, another white male with short hair, stocky build, and a little taller than the other individual was standing near the muffler shop.

Mark Jolly testified that, between 2:30 and 3:00 a.m. on January 30, 1994, he was in the Shoney's parking lot across the street from the Taco Bell, when he "heard a couple of loud bangs" and saw "a man running from the back of the Taco Bell over by the Two Rivers Mall." According to Jolly, the man was a Puerto Rican or a light-skinned black male, wearing shorts, and carrying "something rolled up in a brown bag" in his left hand. After he saw the man, Jolly observed "the lobby lights in the Taco Bell flicker[] on and off two or three times."

Allen Ceruti testified that he passed by the Taco Bell between 4:20 and 4:30 a.m. At this time, he observed a black male standing at the open back door.

Charlie Brown testified that Mathews and the Appellant were both at a party together at the trailer in Oak Grove, likely on January 21st. During his testimony, Brown recanted a statement he made in November of 1995, wherein he said that he heard Mathews talking about robbing the place where he worked.

Melanie Darwish testified that she may have lent her car to the Appellant on the night of the robbery and murders, although she was not sure. According to Darwish, she was at home in bed on that night. Darwish confirmed that Mathews had been at a party at the trailer; however, she did not remember the Appellant being there.

Lopez Gaddes, a convicted drug trafficker, was in the Montgomery County Jail with the Appellant in 1994. While incarcerated, the Appellant told Gaddes that he knew Courtney Mathews and that he, Charlie Brown, and Mathews had conversations about robbing the Taco Bell. According to Gaddes, the Appellant told him that the first conversation about the robbery took place at a party a week or two before the murders. The Appellant also told Gaddes that the group again talked about committing the robbery at the barracks. When Gaddes asked the Appellant if he was scared, the Appellant responded that he was not because "Courtney was the trigger man."

Jason Carr testified that he was incarcerated with the Appellant in the Montgomery County Jail during March of 1994. During a card game with the Appellant and Charlie Brown, one of the two men stated, "David Housler's car was the one that was used in the getaway of Taco Bell."

Larry Underhill, another inmate, testified that the Appellant told him he was at the Taco Bell and that he was the one that killed the employees. Underhill said that the Appellant told him the victims were shot execution-style.

Convicted felon Christopher Ester frequently visited the trailer in Oak Grove. Ester testified that he saw Mathews at the trailer on January 29, 1994. Mathews talked about the robberies he had committed. According to Ester, Mathews and the Appellant had "a little conversation" that night. Ester testified that Mathews left the trailer around 12:30 or 1:00 a.m. and that the Appellant left about 2:30 or 3:00 a.m. after he and Ulangca got into an argument. The Appellant was supposed to call and let the group know his whereabouts, but he never called.

Orlando Gill also frequented the trailer. He believed he met Mathews the weekend before the murders, when Kendra Corley brought Mathews to the trailer. He observed the Ap-

pellant and Mathews engaged in a conversation in the kitchen "for a time."

Hector Ortiz also saw Mathews at the trailer with Corley prior to the murders. He likewise observed Mathews and the Appellant engaging in conversation. Ortiz was at the trailer on the night before the murders and saw the Appellant and Ulangca there. When he left around 1:00 a.m., neither the Appellant nor Ulangca were present in the trailer. When he returned to the trailer around 2:30 or 3:00 a.m., the couple still was not there.

Kendra Corley testified that Mathews did not go with her to a party at the trailer on January 21, 1994 because he was working. Corley stated that she did bring Mathews to the trailer on Saturday the 22nd, and they arrived between 9:30 and 10:00 p.m. Corley maintained that she did not go to a party at the trailer with Mathews on January 28th. According to Corley, Mathews gave her $255 in five dollar bills just prior to his suicide attempt. Corley also identified the black jacket as belonging to Mathews.

James Bowen testified that Corley brought Mathews to the party a week before the murders. Bowen overhead the Appellant and Mathews discussing a robbery at Taco Bell. According to Bowen, the Appellant and Mathews argued over who would "pull the gun and who was going to watch." Bowen testified that Mathews stated they would rob Taco Bell because "he worked there, it would be easier for them to do. He knew how many people would be there and when they closed." Bowen stated that he saw the Appellant and Ulangca go into a trailer bedroom about 2:00 a.m. and that they were still there when he woke up.

The Appellant testified in his own defense. He denied any involvement in the robbery and murders and asserted an alibi defense. At trial, Ulangca now claimed that the Appellant was with her on the night of the murders.

Following the conclusion of the evidence, the jury found the Appellant guilty as charged of four counts of felony murder and imposed a punishment of life imprisonment. After a sentencing hearing on December 12, 1997, the trial court ordered the Appellant's sentences to be served consecutively. Following extensive filings by both parties and three hearings on the Appellant's motion for new trial, proceedings on the motion were completed on July 3, 2000. On February 5, 2002, the trial court summarily denied the Appellant's motion for new trial. This timely appeal followed.

ANALYSIS

I. Use of Confession

The Appellant argues that "the State's use of [his] false confession constitutes prosecutorial misconduct and a constitutional violation." Furthermore, the Appellant contends that "the trial court's admission of the . . . confession constitutes reversible error." We disagree.

First, the Appellant made a voluntary statement to law enforcement officials, wherein he made admissions regarding his culpability in the robbery and murders and disclosed the circumstances surrounding the crimes. Prior to trial, an extensive hearing was held to determine whether the statements should have been suppressed because they were "not voluntarily made and [were] substantially false." In a detailed order, the trial court concluded that, "based upon the totality of the circumstances, that the statements challenged in the defendant's motion to suppress . . . were not the result of intimidation or coercion. Instead, the statements were the product of the defendant's free and deliberate choice and were voluntarily made." The trial court then proceeded to address the issue of the statements being substantially false.

The defendant's second contention is that the statements should be suppressed because they are substantially false. In support of this assertion, the defendant cites *Mooney v.*

Holohan, 294 U.S. 102 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959) and *Miller v. Pate*, 386 U.S. 1 (1967). *Mooney* and its progeny stand for the proposition that false evidence, including false testimony, may not be used to obtain a conviction. As this court noted at the suppression hearing, this line of cases addressed perjured testimony, knowingly false testimony about consideration received for cooperation, and physical evidence which is known to the state to be misrepresented (letting the jury believe paint stain is blood). Obviously, these types of evidence strike at the heart of what the Due Process Clause represents.

However, the instant case does not align itself with any of the above-listed categories. Instead, the statements given by the defendant may be considered a confession of some culpable act or if not a confession, at least an admission against interest. Tennessee law clearly contemplates that all or part of a confession or admission against interest may be false. The jury instruction concerning evidence of a confession (T.P.I. 42.12) instructs the jury that its duty is to judge the truth of the confession. As such, the jury may accept or reject any portion of the confession it chooses. Likewise, the jury instruction concerning admissions against interest (T.P.I. 42.11) demands corroboration by other independent evidence to warrant a conviction.

The testimony offered at the suppression hearing indicates that part of the statements have admittedly been proven false by the state's investigators. However, this Court does not find that the introduction of these statements equates to presenting false testimony to a jury. Our law has built-in safeguards to prevent the state from obtaining a tainted conviction with such evidence. *Brady v. Maryland* and its progeny require the state to produce any evidence which is exculpatory. This requirement gives the defendant access to information he may find necessary to attack the truth or falsity of the statements. Similarly, the state must present independent corroborating

evidence to support those parts of the statement or statements it believes are true.

This Court has already found, without regard to truth or falsity, that the statements were voluntarily made. The determination of the truth or falsity of the statements shall remain with the jury.

The reasoning of the trial court in admitting the evidence is sound. The record supports the conclusion that the statements were voluntarily made, and the determination of the truth or falsity of the confession was properly left to the province of the jury.

Second, the Appellant contends that a confession should not be tested solely by the corroboration rule when the confession is known to be false. In Tennessee, it is well-established that a conviction cannot be founded solely upon a defendant's confession. *State v. Smith*, 24 S.W.3d 274, 281 (Tenn. 2000) (citing *Ashby v. State*, 139 S.W. 872, 875 (Tenn. 1911)). Some corroborating evidence is required which, independently of the confession, tends to establish the corpus delicti of the offense charged. *Id.* However, where there is a confession, the corroborative evidence "need not be as convincing as the evidence necessary to establish a corpus delicti in the absence of any confession." *Ricketts v. State*, 241 S.W.2d 604, 606 (Tenn. 1951). The corroborating evidence is sufficient to sustain a conviction if "it tends to connect the defendant with the commission of the offense, although the evidence is slight, and entitled, when standing by itself, to but little consideration." *Id.*; *see also Smith*, 24 S.W.3d at 281. Moreover, we note that all elements of the corpus delicti may be established by circumstantial evidence. *State v. Jones*, 15 S.W.3d 880, 891 (Tenn. Crim. App. 1999). The Appellant admits that his statement, even if only minimally, was corroborated. If the confession was corroborated, then it is not completely false.

While portions of this confession may have been untrue, the Appellant's involvement in this crime was corroborated by other independent evidence presented at trial. Several witnesses testified that the Appellant and Mathews were together on at least one occasion at the Oak Grove trailer, which corroborated the Appellant's account of their conversation about the robbery. The Appellant stated that Kevin "Red" Tween was to accompany Mathews inside the Taco Bell. In his statement, the Appellant reported that, at the time of the robbery, Tween "was wearing a big dark blue hooded Adidas jacket, black and white shell toe Adidas tennis shoes, blue jeans and black T-shirt with a clown on it." Jacqueline Dickinson testified that she saw a white male inside Taco Bell wearing a hooded green jacket and dark blue jeans around 2:35 or 2:40 a.m. Also, in his statement, the Appellant said he drove his white Tracer to Taco Bell. Dickinson observed a white car at the Taco Bell, which was "facing to the back parking lot" and which was not the victim's vehicle in the crime scene photos. The Appellant stated that Mathews was wearing "a black cloth knee length jacket," which was consistent with other witnesses' accounts and the recovered jacket. According to the Appellant, Melanie Darwish's red Tempo was parked in the mall parking lot behind the Taco Bell. Damien Cromartie testified that a brown or burgundy sedan was parked in the Two Rivers Mall parking lot. Cromortie also testified that he saw at least two people inside the Taco Bell, when he pulled up to the drive-thru window about 3:00 a.m. The Appellant stated that both Mathews and Tween went inside. Additionally, the Appellant reported that a "heavy-set woman white female with brown hair come to the drive-up window." This description was consistent with the characteristics of the victim Marcia Klopp. Finally, the Appellant observed Tween running behind Taco Bell after he heard a "loud bang." Although their descriptions varied, both Bill Hudspeth and Mark Jolly saw a man running near the

Taco Bell around 2:30 a.m. The evidence was sufficient to corroborate the Appellant's confession.

The Appellant asserts that the "statements are contrived, concocted, unreliable, and wholly inconsistent with known and accepted facts[.]" Reliability of the confession was a determination for the jury.

A confession being admitted, its weight is of course a matter for the jury. That is, the jury is to determine whether defendant made the confession and whether the statements contained in it are true. To aid them in resolving these questions the jury may hear evidence of the circumstances under which the confession was procured.

Wynn v. State, 181 S.W.2d 332, 333 (1944); *see also State v. Pursley*, 550 S.W.2d 949, 950 (1997). At trial, the Appellant explained his reasons for making the statements, including his strong desire to get out of jail on a reduced bond. The Appellant also presented the testimony of Charlie Brown as to how the statements were formulated. The jury, as was its prerogative, disagreed with the Appellant's assertion that this confession was false and he was not involved in these crimes. Accordingly, the Appellant's claim that the State is guilty of misconduct and that the trial court erred by admitting the confession is without merit.

II. Recanted Testimony

Next, the Appellant contends that the State committed prosecutorial misconduct by its "persistent and deliberate use of recanted testimony" and its failure "to inform the defense that certain witnesses had recanted their testimony." Within this section, the Appellant argues first about the testimony of Robert Eastland, Robert Dawson, and Jeremy Thompson, and then about the testimony of Michael Miller. We will address these arguments in turn.

A. Eastland, Dawson, and Thompson

With regard to Eastland, Dawson, and Thompson the Appellant argues that:

> Having known about these witnesses for years, the State obtained statements from them within days of trial. Concerned about the eleventh hour production of these witnesses, the Court limited their use to rebuttal. For at least two days prior to their testimony, the witnesses informed the State that they knew nothing about the Taco Bell murders, that Houlser had told them nothing about the Taco Bell murders, that anything said to them by Housler was not related to the Taco Bell murders, and recanted their early November statements.

The State called Eastland and Dawson in rebuttal; however, Thompson was not called to testify. The Appellant's argument is two-fold: (1) the State committed prosecutorial misconduct in presenting the recanted testimony of Eastland and Dawson and (2) the State violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), by failing to disclose the recantations of Eastland, Dawson, and Thompson to defense counsel or the trial court.

First, we conclude that Eastland and Dawson did not recant their trial testimony. The witnesses did not withdraw or renounce their statements but merely informed Attorney General Gus Radford that they would not testify for the State. At trial, the Appellant initially testified that he did not speak with Eastland concerning "redemption." He then stated that he may have spoken with him. In rebuttal and after a jury-out hearing, the State called Eastland to testify as to whether the Appellant talked about redemption during a trip to Clarksville. Eastland testified that he, Thompson, and the Appellant spoke about redemption. Dawson, although reluctant to testify, stated that the Appellant told him that "he had seen a lot of shit in his life." Thompson was not called to testify. Eastand and Dawson testified in accordance with their statements.

Furthermore, Dawson acknowledged his statement was true. Because these were not inconsistent statements, the Appellant's reliance upon *State v. Mays*, 495 S.W.2d 833 (Tenn. Crim. App. 1972), and *State v. Steve Johnson*, No.02-C-01-9504-CC-00097 (Tenn. Crim. App. at Jackson, Feb. 27, 1997), is misplaced. The State did not use recanted testimony and, thus, this issue is without merit.

With regard to a Brady violation, the Appellant contends that the State should have informed defense counsel that Thompson recanted his statements and that, if the State had done so, he could have used Thompson to rebut the testimony of Eastland. Relief under Brady is not available unless the Appellant can establish that the evidence improperly withheld was material to the defendant. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). In order to determine the materiality of undisclosed information, the reviewing court must ascertain whether in the absence of the information the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995). Thus, in order to prove a Brady violation, a defendant must show "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*

The Appellant has not shown that the information that Thompson recanted his testimony was improperly withheld from defense counsel. At the hearing on the motion for new trial, Thompson testified that, on the morning he was to testify for the State, he informed Attorney General Radford that his statement was not true. Thompson was listed as a witness, and the Appellant had complete access to this witness as he was a friend of the Appellant. Regardless, Thompson's testimony was not material to the Appellant. Eastland only testified about the Appellant's talk of "redemption." This was not a material issue in the prosecution of the Appellant. Eastland did not testify that this statement was in

relation to the Taco Bell robbery or murders. We conclude that the Appellant has not shown that the evidence was material to the defense or that Thompson's testimony "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 434, 115 S. Ct. at 1566.

B. Michael Miller

The Appellant argues that the State's use of Michael Miller as a witness constituted prosecutorial misconduct. We conclude otherwise. The proof established that Miller and the Appellant were inmates in the Montgomery County Jail shortly after the Taco Bell crimes. During their incarceration, the Appellant confided in Miller that he and others participated in the Taco Bell robbery and murders. Miller advised the authorities of this fact, resulting in a two-page signed statement to the T.B.I. detailing the Appellant's conversations with Miller. Approximately six weeks prior to the scheduled trial, Miller, who was then incarcerated in a Kentucky penitentiary, was contacted by the T.B.I. regarding his statement. Miller reaffirmed his prior statement to the T.B.I.

During opening statements on November 12, 1997, the attorney general made reference to Miller and the fact that he would be called as a State's witness. In the opening statement by the defense, defense counsel informed the jury:

[DEFENSE COUNSEL]: I want you to remember what the Attorney General told you about Michael Miller. The Attorney General told you that Michael Miller was going to come in here and tell you that David Housler told him a whole bunch of things about this shotgun, and you remember plastic bag, where it was, and all of that? You remember that on November 12th, you were told that. You remember that next week when we come back up here?

On the second day of trial, Miller was called to testify. Before taking the stand, Miller informed the attorney general

that his March 1994 statement to the T.B.I. was false. The attorney general advised the court of this fact and that if a recantation occurred, he would ask that the witness be declared a hostile witness. No objection was entered by defense counsel. During his testimony, Miller denied that he had ever talked to the Appellant about the "Taco Bell murders." He admitted that he gave the statement to the T.B.I. but explained that he either made the facts up, read about the facts in the newspaper, or was told what to say by the T.B.I. agent. Early into direct-examination, defense counsel posed an objection as to the attorney general's manner of impeachment. A bench conference was held. The record of this conference reflects that defense counsel's objections stemmed from the fact that "[the attorney general] has never asked this man what he said in the statement? If he puts that in, then he can say how did you know this? Why did you change—." The trial court agreed with defense counsel's recommendations, which were followed by the attorney general during the remainder of direct examination. The State concluded its examination without introducing the witness' prior inconsistent statement or requesting that the witness be declared hostile. During cross-examination, defense counsel moved for introduction of the witness' signed statement as an exhibit and conducted an extensive line-by-line impeachment of its contents.[3] Upon conclusion of Miller's testimony, the trial court voiced concerns as to its use by the jury. Another bench conference was held, during which defense counsel suggested that the attorney general's actions in calling Miller to testify constituted reversible error because the State did not provide notice of his recantation to the Appellant. The attorney gen-

[3] The State conceded at trial that portions of Miller's statement were possibly false; however, these statements were not inculpatory in nature and no questions were asked of the witness regarding these particular statements. In contrast, these statements were fully explored and capitalized on by the Appellant during his examination of Miller.

eral responded that he had informed the court and defense counsel of the witness' potential for recantation upon learning of this fact. Moreover, the attorney general noted that, although the State learned of the witness' recantation that same morning, the testimony of Miller indicated that Miller had informed defense counsel investigators that he was recanting "two or three days" prior, during their visit with him at the penitentiary. Defense counsel responded, "He's right, that we interviewed this witness and this witness told us that his statement was not true, but as the witness testified, he had told the [T.B.I.] six weeks ago that it was true." The attorney general also asserted that he was disturbed by defense counsel's opening remarks to the jury which "challenged me to deliver on Miller," when he knew at the time that Miller would be recanting. With regard to the facts in dispute, the trial court found:

THE COURT: . . . My recollection at the sidebar was that [the attorney general] wanted to--brought to the Court's attention that the witness, Michael Miller, who he was about to call, may very well become a hostile witness and [the attorney general] was seeking to have him treated as a hostile witness under Rule 611, so that he could lead him.

. . .

And I so instructed Counsel to do that and Mr. Terry agreed that that's the way it ought to be done.

At that point in time though, I don't suppose anyone knew—first of all, whether he was going to say that his statement was false, or if he was going to say that, was he going to say that it was entirely false or only partially false?

. . .

. . . [The attorney general] is correct, that after [he] finished examining the witness, then the cross examination by the Defense was to go over the statement again, line by line. So

not only was there no objection from the Defense, the examination conducted by the Defense would act as a waiver in terms of complaining about the fact that the witness was allowed to testify.

Nonetheless, the trial court noted that it wanted to reflect further upon the question of whether a proper limiting instruction could be given under the circumstances or whether Miller's entire testimony should be stricken. Before recessing the jury for the day, the trial court instructed the jury as follows:

As a matter of law, the Court has ordered the testimony of Michael Miller stricken from the record. That means that the testimony of Mr. Miller must be disregarded by you in its entirety and treated as though you never heard it. If you have notes in your notebook regarding the testimony of Mr. Miller, I am now instructing you to separate those notes from your notebooks and tender those separated Miller notes to the Court.

You may not place any significance on either the testimony of Mr. Miller or draw any inferences from this instruction or this proceeding. If you will just take a moment and separate your notes from your notebook, if you have them? It may mean that you have a portion of a page that is separated rom your notebook and I am sure you will be able to keep up with it.

The record indicates the jurors complied with this request.

Tennessee Rule of Evidence 607 allows a party to impeach its own witness, and Rule 611 allows the use of leading questions on direct examination of a hostile witness. Tenn. R. Evid. 607, 611(c). Moreover a party may impeach a hostile witness by asking the witness whether they previously made certain prior inconsistent statements. Tenn. R. Evid. 613(a), Neil P. Cohen et al., Tennessee Law of Evidence § 6.13[2] (4th ed 2000). At trial there are limits on the State's power to

impeach its own witnesses by presenting the witnesses' prior inconsistent statement. *See Mays v. State*, 495 S.W.2d 833 (Tenn. Crim. App. 1972). Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony. *State v. Roy L. Payne*, No. 03C01-9202-CR-00045 (Tenn. Crim. App. At Knoxville, Feb. 2, 1993). In *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984), the court explained:

> [I]t would be an abuse of [Federal Rule of Evidence 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize.

Webster, 734 F.2d at 1192.

At this juncture, we would note that a party may not be granted relief for an error by failing to take whatever action was reasonably available to prevent or nullify the harmful effect of the error. Tenn. R. App. P. 36(a). In this regard, the record reflects that, not only did the Appellant never object to the admission of Miller's prior inconsistent statement or request that it be stricken, but he facilitated its introduction by conducting a line-by-line examination of the statement. Moreover, it was the Appellant who moved for introduction of the statement into evidence. As found by the trial court, any objection to the prior inconsistent statement was waived.

Notwithstanding waiver, we elect to review this issue upon its merits. Central to this issue is whether the introduction of Miller's hearsay statement by the State to impeach its own witness was motivated solely by the desire to put the statement before the jury. The fact that the attorney general was

not surprised by Miller's testimony at trial does not indicate bad faith. Rule 607 does not require that the party calling the witness be surprised before the witness can be impeached. Tenn. R. Evid. 607. As has already been observed, the attorney general's use of the statement was limited in scope, as opposed to the Appellant's, and focused primarily upon the Appellant's statements regarding the location of the discarded shotgun. The record reflects that the shotgun was located by law enforcement officers based upon information supplied in Miller's statement. As such, the attorney general explained that he was primarily attempting to lay the foundation for those officers and the forensic proof which was to follow.

Based upon the record before us, we are unable to conclude that the State's impeachment by use of the Appellant's prior inconsistent statement was employed for the primary purpose of placing before the jury evidence which was not otherwise admissible. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1995). Indeed, the record reflects that the Appellant was equally interested, for his own tactical reasons, in placing Miller's testimony before the jury, as at times his testimony tended to damage the State's case. For these reasons, any examination under Rule 403, Tennessee Rules of Evidence, is unnecessary.[4]

Finally, we disagree with the Appellant's characterization of the attorney general's actions in calling Miller as a witness as "prosecutorial misconduct." The defense and the State were both equally aware of Miller's potential for recantation;

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[4] In this regard, we note that certain portions of Miller's testimony on direct-examination, i.e., location of the shotgun, was corroborated by other witnesses. Furthermore, the testimony was stricken from the record following the Appellant's objection to the testimony, which only occurred after Miller's testimony was concluded and the trial court voiced its concerns as to its use. Therefore, we conclude that the Appellant suffered no prejudice from the State's examination of Miller.

however, it was the State who informed the trial court of this possibility. This issue is without merit.

III. Testimony of Larry Underhill

The Appellant argues that "the trial court's admission of the testimony of [Larry] Underhill allowed the prosecution to introduce recanted false testimony and constitutes reversible error." He submits that:

There is no doubt whatsoever that Larry Underhill's testimony was false, and that Underhill, by his own admission, has committed perjury. There is no doubt whatsoever that Underhill's testimony was significant to the State's case. Without the false testimony, the jury would not have been exposed to Eastland and Dawson, and to the State's rehash of the incredible tale at closing. Without the false testimony it is more than probable that the jury might have reached a different conclusion.

Prior to Underhill's testimony, the State informed the trial court that it was "not comfortable" with all of Underhill's testimony; therefore, the State planned only to question him about statements the Appellant made concerning redemption. The State believed the Appellant's talk of redemption could be corroborated by Robert Eastland. Defense counsel stated to the court that Underhill's statement was "full of lies." However, the trial court ruled that the decision on Underhill's credibility rested with the jury.

Underhill and the Appellant encountered each other while they were incarcerated in the Montgomery County Jail. Underhill testified to the following upon direct-examination:

A. Mr. Housler told me that he had done a terrible thing. He was crying in the middle of the night.

Q. What did you say?

A. I responded, I said David, do you want to talk about it? I first said what's wrong David? Do you want to talk about it?

Q. What did he say?

A. And David—again, I repeat, I've done a terrible thing. He said, Larry, I've lied to you—he said I lied to you about not being at the Taco Bell when the robbery and murders were committed.

Q. Did you say anything then?

A. Not that I recall, no sir.

Q. Then what did he say?

A. He said I was there at the time of the murders and he said not only was I there, I was the one that killed the employees there.

Q. Was he crying at that time?

A. He was crying and he was badly shaken, yes.

Q. What did he say then?

A. He asked me if I thought that God would forgive him for those sins? And I told him at that time, I said well—David, I really don't know, but I said you need to be saved. I think that you need to be saved first because I am not sure that God will answer prayer unless a person is saved. And then he asked me if I knew of any unforgivable sin? And I replied, I said David, the only one that comes to mind—this is based on my past teachings, would be blasphemy against the Holy Ghost or in other words, a total rejection of the existence of God or Jesus.

Defense counsel then went on to extensively cross-examine Underhill, concerning the details of this conversation and his history of crime, alcohol use, and mental health problems.

At the motion for new trial hearing, Underhill testified that, while at the time of trial he believed his testimony was accurate, he now believed that his conversation with the Appellant was a hallucination. Underhill stated that he encountered Courtney Mathews at the Turney Center following his testimony in the Appellant's trial. According to Underhill,

Mathews told him that the Appellant was not involved in the Taco Bell robbery and murders, but Mathews was "going to let him swing." Underhill claimed that he sent a letter to Attorney General Radford reporting this conversation; however, Radford stated he never received such a letter. In sum, Underhill completely recanted his trial testimony.

Before granting a new trial on the basis of newly discovered recanted testimony, the trial court must find that: (1) it is reasonably well satisfied that the testimony given by the material witness was false and the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, or was surprised by the false testimony, or was unable to know of the falsity of the testimony until after the trial; and (3) the jury might have reached a different conclusion had the truth been told. *State v. Ratliff*, 71 S.W.3d 291, 298 (Tenn. Crim. App. 2001) (citing *State v. Mixon*, 983 S.W.2d 661, 673 n. 17 (Tenn. 1999)).

In the case at bar, the trial court did not make any formal findings on the record. However, concerning the letter Underhill allegedly sent to Attorney General Radford, the trial court noted, "[At least if he had written it and Mr. Radford had received it that would be some corroboration that Mr. Underhill did what he said he did." Impliedly, the trial court was troubled with Underhill's credibility. We conclude that the trial court was not "reasonably well satisfied" that the new testimony given by Underhill was true. Furthermore, the Appellant has not met his burden that the jury might have reached a different conclusion had the truth been told. Contrary to the Appellant's assertion, Underhill's testimony

was not "material" or "significant." Underhill testified that the Appellant was the shooter, which was not the State's theory at trial. Also, the State only presented Underhill to elicit testimony concerning redemption, which was corroborated by another witness. Accordingly, we conclude that this issue is without merit.

IV. Juror Misconduct

The Appellant contends that "[t]here is an incredible amount of evidence in this record regarding juror misconduct." Specifically, he argues that he is entitled to a new trial because a juror slept during trial and was, therefore, incapable of rendering a fair verdict.

This issue was raised for the first time in the motion for new trial. Apparently, Alternate Juror David Tanksley contacted defense counsel after the return of the guilty verdict to convey his concerns. At this time, Tanksley related that a juror, Bobby Martin, was regularly asleep throughout the trial. In support of his motion for new trial, the Appellant presented the testimony of Tanksley. Tanksley testified to the following:

Q. . . . [D]id you observe whether or not [Mr. Martin] was sleeping for part of the trial?

A. Yeah, he—well, I guess in the jury room and all that we'd make kind of jokes. And we'd even talk to him, say, man, you're going to get into a lot trouble for sleeping. You need to wake up and stay up.

And while we're sitting in the jury panel—I mean the seats every once in a while, I think his name was Richard Davis, the other alternate, he'd nudge me and point over to him and I'd look over and observe him and he'd be nodded out.

And a couple of the others down there would kind of look up and move their heads that way and, you know, you'd see him over there sleeping.

. . .

Q. And this pattern of sleeping, did it occur throughout the trial?

A. Yes, it did. Even in—during breaks he'd,—you know, when we was in the jury room, I guess, recess room, he'd sit there and nod out. And we'd mess with him, you know, better wake up, you know, you better, you know, pay attention.

We—some of us even made comments, you know, he's liable to get thrown off this trial because of it.

Q. So, he was—it was a persistent pattern? It was something that happened every day?

A. Yes.

The State, in rebuttal, provided the testimony of Juror Bobby Martin and the remaining eleven jurors and one alternate. Martin admitted that he "nodded off." Juror Jason Taylor testified that he observed Martin "being woken up prior to recess." According to Taylor, he only observed Martin sleeping on this one occasion. Alternate Juror Richard Davis testified that he did remember Martin napping during recess but did not remember Martin "taking a nap during the trial period."

The mere fact that a juror becomes drowsy for a short time is not of itself a ground for a new trial. *State v. Chestnut*, 643 S.W.2d 343, 346 (Tenn. Crim. App. I 982); *see also State v. Phillip Howard White, Jr.*, No. M2001-03109-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 2, 2003), perm. to appeal denied, (Tenn. 2003); *State v. Donald Wayne Marshall*, No. E1999-00922-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Feb. 18, 2000). In order to constitute a ground for new trial, an objection must be promptly raised and prejudice must be shown. *Chestnut*, 643 S.W.2d at 346. This issue was not presented to the trial court at any time during the trial. None of the attorneys or the court observed Martin sleeping

during the trial. This failure by any of the parties to observe Martin sleeping belies the Appellant's claim that this was an everyday occurrence. Even during the motion for new trial, defense counsel could not assert any facts to show prejudice. The testimony presented at the motion for new trial hearing does not indicate the length of time Martin may have nodded off on this one occasion or the importance of the evidence being presented at this time. This issue has no merit.

As an apparent afterthought in this section of the Appellant's brief, the Appellant asserts, "[J]urors, prior to deliberations, discussed thecase amongst themselves and formed and expressed opinions about the [Appellant's] guilt or innocence." First, while testimony concerning this issue was heard from all twelve jurors and both alternate jurors at the motion for new trial hearing, the Appellant's argument does not state this proposition in the form of an issue as required by Rule 27(a)(4), Tennessee Rules of Appellate Procedure. Second, this issue has not been briefed. Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure provides, in relevant part, that:

> The brief of the appellant shall contain . . . [a]n argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on.

See also Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987). Third, nowhere in the brief is there reference to the record. Tenn. R. App. P. 27(g). "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b). In the present case, the Appellant does not provide this court with any information

concerning jury discussions prior to deliberations or how he was prejudiced by such discussions.[5] In sum, the Appellant has failed to comply with Rule 27. This issue is without merit.

V. Mathews Time-line

The Appellant next argues that "the Mathews time-line proves [his] innocence; this court cannot ignore this clear proof of innocence." Specifically, he asserts that:

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[5] It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body. *United States v. Resko*, 3 F.3d 684, 688 (3rd Cir. 1993). When jury misconduct is alleged, including improper intra-jury influences, the trial court should: ascertain whether the misconduct actually occurred; if it did, determine whether it was prejudicial; and if there are no grounds for a new trial, specify the reasons it decided that misconduct did not occur or occurred but was non-prejudicial. *Id.* at 691. At the motion for new trial hearing, Alternate Juror Tanksley testified that, during evening card games amongst the male jurors, comments were made that the State "hadn't proven anything" and the case was a waste of the "tax payers money" and the jurors time. He also testified that they commented that the T.B.I. agents "influenced Housler as far as a confession went" and they did not find the witness, who testified to the location of the Appellant's car at the Taco Bell, credible. Furthermore, Tanksley also testified that, during "smoke breaks," the following comments were made: "I'm not getting anything out of this[,]" and "I don't see any guilt verdict[.]" The only other testimony concerning premature deliberations comes from Juror Billy Ray Nipper. Even assuming that these comments support juror misconduct, we nonetheless find no basis for reversal as the Appellant has suffered no prejudice from the premature deliberations. The comments were brief, and the jurors did not rely upon any evidence outside of the record in reaching their verdict. The comments also do not show that any of the jurors actually decided upon the Appellant's guilt before the case was submitted to them. Most importantly, the comments conveyed the belief that the Appellant was innocent and, thus, were favorable to the Appellant. While we find that the issue was waived, the record before us reflects that it was not error to deny relief on this ground.

The Mathews time-line is more than forty pages of detailed entries from the whole universe of Taco Bell information. Most importantly, the Mathews time-line contain entries from statements given by Courtney Mathews to his defense team . . . . Mathews had provided his defense team with a truthful account that completely comports with the credible testimony and physical evidence in this case. . . . Mathews [does not] mention David Housler, or any other accomplice in any aspect whatsoever. . . . There is no more convincing proof that Housler was not involved. If Housler, or any other person had assisted Mathews, this time line would be littered with every detail of their participation. Absence of David Housler from the Mathews time-line indicates the truth. Housler was not involved at Taco Bell. The truth cannot be ignored by this Court.

According to defense counsel Stephanie Gore, she copied the time-line at the office of one of Mathews' attorneys before Housler's trial. At no time prior to the motion for new trial, did the defense bring the information to the attention of the trial court. At most, the defense attempted to subpoena Mathews at trial, but he refused to testify. The time-line was not introduced as an exhibit, and there was never a discussion as to whether the time-line and its contents were admissible.

We note that the Appellant again has failed to comply with Rule 27(a)(7), Tennessee Rules of Appellate Procedure, as the Appellant has not provided this court with any legal authority in support of his claim. Regardless of waiver, this claim is without merit.

The Appellant's argument of "actual innocence" is premised solely on the existence of the time-line and does not relate to sufficiency of the evidence. The State asserts, and we agree, that, "[a]lthough [the Appellant] has not characterized the time-line as newly discovered evidence, the [Appellant] appears to ask this Court to consider it as new evidence proving his innocence in the Taco Bell murders." In seeking a

new trial based on newly discovered evidence, a criminal defendant must establish (1) reasonable diligence in attempting to discover the evidence, (2) the materiality of the evidence, and (3) that the evidence would likely change the result of the trial. *State v. Meade*, 942 S.W.2d 561, 565 (Tenn. Crim. App.1996) (citing *State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994)). If the defendant fails to show that he and/or his attorney exercised reasonable diligence in the procurement of a witness at the original trial, the trial court may properly deny a motion for new trial based on newly discovered evidence. *Hawkins v. State*, 417 S.W.2d 774, 778 (Tenn. 1967). Moreover, the trial court is afforded broad discretion in deciding whether to grant or deny a motion for new trial based on newly discovered evidence, and its decision will not be overturned on appeal absent a clear abuse of discretion. *State v. Walker*, 910 S.W.2d 381, 395 (Tenn. 1995), *cert. denied*, 519 U.S. 826, 117 S. Ct. 88 (1996).

Clearly, counsel knew of the time-line prior to trial, yet chose not to reveal it prior to or during trial. Additionally, there is no proof that the time-line was material or that the evidence was likely to have changed the result. Ironically, the Appellant contends that Mathews' statements "comport[] with the credible testimony and physical evidence" and asks us to completely disbelieve the statements made by the Appellant to law enforcement. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).This court does not possess fact finding authority; our jurisdiction being appellate only. Tenn. Code Ann. § 16-5-108 (1994). Furthermore, many of Mathews' statements contained in the time-line are inconsistent with the proof and other statements attributed to Mathews. For these reasons, the Appellant was not entitled to a new trial based upon the time-line.

VI. Inconsistent Theories

The Appellant, relying on *Smith v. Groose*, 205 F.3d 1045 (8th Cir.), *cert. denied* sub nom. *Gammon v. Smith*, 531 U.S. 985, 121 S. Ct. 441 (2000), contends his convictions should be vacated because the State violated his due process rights by presenting evidence and arguments during his trial which were fundamentally inconsistent and inherently contradictory to evidence and arguments presented during the previous trial of Courtney Mathews.[6] These cases were tried by two different attorneys general.[7]

Our court, in *State v. Gregory Robinson*, No. W2001-01299-CCA-R3-DD (Tenn. Crim. App. at Jackson, Aug. 13, 2003), perm. to appeal granted, W2001-01299-SC-R11-DD (Tenn. Jan. 26, 2004), recently adopted the Eighth Circuit's approach in Smith, 205 F.3d 1045. In Robinson, we held a

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[6] The State argues that:

> [the Appellant's arguments regarding inconsistent theories are waived to the extent he relies on the transcript from Courtney Mathews trial. The Mathews record is not included in the record before this Court. Tenn. R. App. P. 24.. . . [The Appellant] fails to cite to the record before this Court to support his assertions. Rule 10(b), Rules of the Court of Criminal Appeals.
>
> This court has previously denied the Appellant's request to supplement the record with the transcript from Courtney Mathews' trial. See State v. David G. Housler, No. M2003- 03122-CCA-R1O-CD (Tenn. Crim. App. at Nashville, Feb. 23, 2004). We agree with the State that this argument is waived to the extent he relies on the Mathews' transcript; however, we find the current record is sufficient to address this issue.

[7] John Carney is the Attorney General for the 19th Judicial District, which includes Montgomery County. Attorney General Carney was involved in the prosecution of Courtney Mathews. He and Assistant Attorney General Steven L Garrett recused themselves from the prosecution of the Appellant because they were potential witnesses in his case. Attorney General Robert "Gus" Radford of the 24th Judicial District was appointed Attorney General Pro Tem in the prosecution of the Appellant.

prosecutor's use of factually contradictory theories in separate trials of different defendants violated the principles of due process. *Gregory Robinson*, No. W2001- 01299-CCA-R3-DD (citing *Smith*, 205 F.3d at 1052-53). *Robinson* also emphasized that:

such due process claims are unusual, will not often occur, and must exist at the core of the prosecution's case in order to justify relief. *See Smith*, 205 F.3d at 1052. A defendant must establish the prosecutorial inconsistencies led to a reasonable likelihood that the outcome of the trial would be different absent the inconsistencies. *See United States v. Bagley*, 473 U.S. 667, 677, 105 S. Ct. 3375 (1985) (noting failure to provide exculpatory evidence, a due process violation, requires a "reasonable likelihood" of a different outcome in order to secure relief); Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, 89 Calif. L. Rev. 1423, 1471 (2001) (suggesting adoption of "reasonable likelihood" test).

In accordance with Robinson, we must first determine whether the State's prosecution theory in the instant case was contradictory to the evidence or arguments it presented in the previous trial of Courtney Mathews. The Appellant contends that, at Mathews' trial, the State argued that Mathews acted alone in the Taco Bell robbery and murders, but the State then proceeded to argue at the Appellant's trial that he assisted Mathews in the commission of the crimes by acting as a lookout. He asserts that:

In the Mathews' case, the prosecutors conformed their presentation to competent physical proof and to credible witness testimony. The Mathews prosecution matches the Mathews Time Line, which is the truth. However, in the Housler prosecution, the prosecuting attorneys used Housler's false confession as their centerpiece, and then tried to corroborate one aspect of it to meet their burden. The Mathews

trial was an effort to prove the truth; the Housler trial was an effort to prove a false confession. The result is necessarily inconsistent.

The Appellant's argument on inconsistent theories rehashes many of the previous issues. Because we have found the Appellant's previous issues, concerning the Mathews timeline, recanted testimony, and use of the Appellant's confession, to be without merit, we will not address them again.

The Appellant goes on to point out numerous factual inconsistencies in support of his position, including discrepancies in time, cars seen by witnesses at the Taco Bell, whether Mathews hid in the bathroom ceiling or whether the broken ceiling tile was staged, the purchase of ammunition for the robbery, and the location of the shotgun before it was used to commit these crimes.[8] For example, the Appellant claims that the State's theory in Mathews that he drove his own car to the Taco Bell was inconsistent with the statement presented at this trial that the Appellant drove Mathews to the Taco Bell. Assistant Attorney General Steven Garrett testified at the Appellant's trial that he believed Mathews could have driven himself to Taco Bell, although several cars were involved in the crimes. The Appellant again invites us to conclude that Mathews' statements are more credible than his. Credibility of witness and all factual issues are determinations for the trier of fact. *Pappas*, 754 S.W.2d at 623. Furthermore, relying on the closing argument in the Mathews' trial, the Appellant maintains that the State asserted

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[8] At oral argument in this case, it was developed that the trial court ruled that the State's theories were "mutually exclusive of one another[;]" however, the trial court, summarily denied the Appellant's motion for new trial. Thus, we must conclude that the trial court either reversed its oral finding on the subject or concluded that there was not a "reasonable likelihood" that the outcome of the trial would have been different absent the inconsistencies. Without these findings, we proceed to address, in full, the merits of this issue.

the Appellant acted alone. Attorney General John Carney testified that his closing argument was directed towards Courtney Mathews because he was the person on trial. Carney also testified that he believed more than one person was involved because one person acting alone could not have done everything.

The mere fact that some of the evidence presented in the Mathews' trial was not consistent with some of the evidence in the Appellant's trial does not mean that the State presented factually irreconcilable theories. The government is not required to "present precisely the same evidence and theories in trials for different defendants." *Smith*, 205 F.3d at 1052. Furthermore, the government's inconsistency "must exist at the core of the prosecutor's case against the defendants for the same crime" in order to justify relief. *Id.* The factual inconsistencies between the Appellant's trial and Mathews' trial did not exist at the core of the prosecution's case. The State prosecuted Mathews as the shooter and the Appellant as the lookout. In fact, the State introduced much of the evidence from the Mathews' trial at the trial of the Appellant. We conclude that the State did not advocate inconsistent theories in the prosecution of the Appellant and Mathews. Furthermore, the factual inconsistencies relied upon by the Appellant were not central to the State's case. Because there is no showing of a "reasonable likelihood" of a different result, we conclude there was no violation of the Appellant's due process rights. *See Robinson*, No. W2001-01299-CCA-R3-DD.

VII. Sentencing

Finally, the Appellant contends that the trial court erred by ordering his four life sentences to be served consecutively. Appellate review of the imposition of consecutive sentences is de novo with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). The presumption of correctness imposes upon the

appealing party the burden of showing that the sentence imposed is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Consecutive sentences are warranted if the trial court finds, by a preponderance of the evidence, that any of the seven enumerated criteria of Tennessee Code Annotated § 40-35-115(b) (2003) exists. Moreover, in determining whether the sentencing court providently exercised its discretion, "the overriding concern" is the fairness of the resulting sentence under all the circumstances. *State v. Sullivan*, No. M1999- 02547-CCA-R3-CD (Tenn. Crim. App. at Nashville, Oct. 13, 2000); *see generally Gray v. State*, 538 S.W.2d 391 (Tenn. 1976).

In this case, the trial court found that the Appellant was "a dangerous offender whose behavior indicate[d] little or no regard for human life and no hesitation about committing a crime when risk to human life [was] high." Tenn. Code Ann. § 40-35-115(b)(4). Additionally, for purposes of a dangerous offender classification, the trial court, in accordance with State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995), found that an extended sentence was necessary to protect the public against further conduct by the Appellant and consecutive sentencing reasonably related to the severity of the offenses.

The Appellant argues that, because no aggravating circumstances existed, he can not be sentenced as a dangerous offender. He bases this assertion on the fact that the jury imposed a sentence of life with the possibility of parole and, thus, did not find any "statutory aggravating circumstance" to exist. The Appellant is correct that the decision to impose consecutive sentences when crimes inherently dangerous are involved should be based upon the presence of aggravating circumstances and not merely on the fact that two or more dangerous crimes were committed, *Gray*, 538 S.W.2d at 393; however, his argument is misguided. In order to impose a sentence of life without parole, which this jury did not do in this case, one of the enumerated aggravating circumstances

must be found to exist beyond a reasonable doubt. See Tenn. Code Ann. § 39-13-204(h) (2003). When imposing consecutive sentences as a dangerous offender pursuant to Tennessee Code Annotated § 40-35-115(b)(4), the trial court is not limited to the enumerated aggravating circumstances of Tennessee Code Annotated § 39-13-204(h). *See State v. John V. Woodruff*, No. 01C01-9507- CR-00217 (Tenn. Crim. App. at Nashville, Aug. 1, 1996) (two consecutive life sentences for murder); *State v. Kong Chung Bounnam*, No. 02C01-9803-CR-00095 (Tenn. Crim. App. at Jackson, Aug. 16, 1999), perm. to appeal denied, (Tenn. 2004) (two of three life sentences for murder were ordered to be served consecutively). Thus, we proceed to determine if sufficient aggravating circumstances existed in this case to classify the Appellant as a dangerous offender.

In its sentencing decision, the trial court ordered the Appellant to serve consecutive sentences and reasoned in part as follows:

There was testimony by Mr. Housler and others, that Mr. Housler met Mr. Courtney Mathews at a trailer up in Oak Grove, Kentucky, this side of Oak Grove and that there, there was an announcement, if not a plan, announced by Mr. Mathews that he was going to the rob his place of employment and that that place of employment was the Taco Bell. There was testimony that Mr. Housler, in his words, gassed up Mr. Mathews, encouraged him to do that. There was testimony that Mr. Housler said that he knew that when the robbery took place, that it was Mr. Mathews' intent to leave no witnesses.

There was a showing, based on the evidence, that there was a planning of this robbery. There was sufficient evidence to sustain the finding by the jury that it was the intent of Mr. Mathews to kill everybody in there. And it was a—the evidence was sufficient for this jury to conclude that Mr. Housler knew that Mr. Mathews was going to do that and he

knew that the lives of those people were in jeopardy. Not only did he know that, but there was evidence that Mr. Housler indicated a willingness. In fact, he said at one point, that he could be talked into it. There were statements by Mr. Housler that efforts were made to carry out the robbery, that efforts were made to put together the wherewithhall to carry out the robbery. Mr. Housler, by his own words, said that he went down there, that he acted as a look out, and so it is . . . reasonable that the jury could conclude that Mr. Housler engaged in the planning of it. That he engaged in the preparations for it. That he engaged in participation of it, and that he knew that when Mr. Mathews went in there, that he was armed and that he knew when he came out of there, that the likelihood was that nobody was going to be alive.

. . .

So is Mr. Housler a dangerous offender whose behavior indicates little or no regard for human life? Yes, because he knew what was going to take place. He knew that the plan was to kill everybody, and he participated willingly to aid in that happening.

The next factor is did he have any hesitation about committing that crime? Or committing a crime in which the risk was high? By his own words, he said he could be talked into it. By his own words, he went down there. There is no evidence that he abandoned the notion. There is no evidence that he made any effort to change Mr. Mathews' mind. There is no evidence that he did anything that would be probative of hesitation. And the fact that he went down there in the fashion stated by the Court, indicates that there was no hesitation on his part in committing this crime, along with Mr. Mathews when he knew that human life was at risk.

. . .

The Wilkerson case requires that a consecutive sentence must be or can be ordered only if there is some specific

relationship between the severity of the offenses and consecutive service. . . .

These offenses are severe[.] . . . [T]he severity of the offenses are certainly great. They are [egregious]. And considering the principles, considering the severity of the crime, the Court finds that an extended sentence is necessary to protect the public against further criminal conduct by the [Appellant] and that a consecutive sentence is reasonably related to the severity of the offenses that were committed.

We agree with the trial court that consecutive sentencing in this case is clearly congruent with general principles of sentencing. The record establishes that the Appellant aided in the planning of the robbery, participated in the robbery by acting as a lookout, and knew Mathews intended to "leave no witnesses." The Taco Bell employees were murdered execution style. Furthermore, the Appellant, by his own admission, "gassed up" Mathews to commit the robbery and murders. Clearly, the Appellant is a dangerous offender whose behavior reflects no regard for human life and no hesitation about committing violent offenses where risk to life is high. Moreover, the aggregate sentence imposed is reasonably related to the severity of the offenses and is necessary to protect the public from further criminal acts by the Appellant. The Appellant is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing, we affirm the Appellant's four convictions for felony murder and the imposition of four consecutive life sentences.

APPENDIX P – Trial Court Findings, *Housler*, Pre-Trial

IN THE CIRCUIT COURT OF TENNESSEE
AT CLARKSVILLE
THE NINETEENTH JUDICIAL DISTRICT

CASE NO. 36548

STATE OF TENNESSEE,
Appellee,

versus

DAVID HOUSLER,
Appellant.

** M O T I O N S **

THE HONORABLE JOHN H. GASAWAY III,
PRESIDING JUDGE
April 22, 1997 Volume

APPEARANCES

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* * * *

[17] on this case? This is their case.

THE COURT: Thank you.

I hope that I am able to address the areas that I want to address and to articulate well enough for everyone to understand the concerns and beliefs of the Court in terms of the significance of this proceeding and what areas are proper and what areas are improper and what plans hopefully, we can make in terms of managing this case and moving it forward to a resolution.

I will try to address these concerns in such a fashion that my comments are contextually understood, but I am not saying what I am now saying from any prepared text, so if you don't understand what I am saying, please feel free to make a note of it and I will give you an opportunity to address me again when I finish.

This is an unusual case. This issue is an unusual issue is really what I am trying to say. Not so much that this case is unusual, but this issue is unusual.

It is unusual in the sense that based on what the lawyers tell me, the State readily admits that a portion of the defendant's statements is untrue and may well be untrue in large measure? So let me just try to address these issues one at a time.

First of all, I almost feel like we had to go through this yesterday to get where we are today.

* * * *

No. 06-259

Supreme Court, U.S.
FILED
SEP 25 2006
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In the Supreme Court of the United States

DAVID G. HOUSLER, JR.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission of a criminal defendant's own statements, parts of which the prosecution believed to be false but which it did not urge the jury to accept as true, violates Due Process.

2. Whether it violates Due Process to prosecute two co-defendants for the murder of four fast-food restaurant employees during a robbery by prosecuting one defendant on the theory that he robbed the restaurant and shot the victims, and subsequently prosecuting the other defendant on the theory that he was a lookout in the parking lot of the restaurant during the robbery.

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OPINIONS BELOW

The May 19, 2006, opinion of the Tennessee Supreme Court, which affirmed the petitioner's convictions and sentences, is reported at 193 S.W.3d 476 (Pet.App. A) The February 27, 2004, opinion of the Court of Criminal Appeals, which affirmed the petitioner's convictions and sentences, is not reported. (Pet.App. O)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner David Housler and his co-defendant, Courtney Mathews, were each tried and convicted, in separate trials, of felony murder for the deaths of four employees of a Clarksville, Tennessee, Taco Bell restaurant during a robbery. Mathews was convicted as the shooter of the four victims inside the restaurant; petitioner was convicted as the lookout positioned outside in the parking lot during the robbery.

At 7:20 a.m. on January 30, 1994, John Ballard, a shift manager at the Taco Bell on Riverside Drive in Clarksville (T.E. X. 70-72), arrived to open for the day. He noticed that employee cars were still in the lot from the night before. (T.E. X. 93-94) When Ballard had stopped by the restaurant at approximately 1:45 a.m. that morning, the employees had been engaged in normal closing activities. (T.E. X. 76-78) After unlocking the main entrance, Ballard entered the building and saw a body near the back of the building in the dish area. (T.E. X, 99) He left and phoned police. (*Id.*)

Clarksville Police Officer Tony Blakely arrived, checked the building, and found the bodies of four Taco Bell employees inside: Kevin Campbell, Angela Wyatt, Patricia Price, and Marcia Klopp. The body of Kevin Campbell was found by the men's restroom, in the corner near a door. (T.E. XI. 143) The second victim, Angela Renea Wyatt, was nearby under a stainless steel sink. (T.E. XI. 145-47) A few feet away, Blakely discovered the body of Patricia Price. (T.E. XI. 148) Just outside the office was the fourth victim, Marcia Klopp, the shift manager. (T.E. XI. 150) All of the victims had died from multiple gunshot wounds. (T.E. X. 112-136; Exs. 7-10)

Authorities recovered evidence that the Taco Bell had been robbed. The office safe had been broken into (T.E. XI. 210, 212-213), and it was determined that $2,967.68 had been taken from the store. (T.E. XI. 169-70) T.B.I. Agent Dan Royse recovered twenty-four .9 mm cartridge cases and eight bullets from the scene (T.E. XIII. 166-70), as well as a fired and unfired shotgun shell case and small lead fragments. (T.E. XIII. 188) Royse later concluded that the shotgun had been used to blow open the safe. (T.E. XIII. 190-91) Tiles in the ceiling of the men's and women's restroom were displaced (T.E. XI. 203), and fingerprints were lifted from a ceiling vent cover and a door jamb in this area. (T.E. XI. 230)

On that same morning, January 30, 1994, David Rose, an employee of a nearby McDonald's restaurant, while emptying trash outside the restaurant, found a bag containing shotgun shells, .9mm shells, a black leather glove, a black wallet, and change in wrappers. (T.E. XI. 181) Clarksville Police Officer John Hunt, while later searching for evidence along Interstate 24 in the area of Taco Bell, found a black coat on an embankment by the Red River bridge. (T.E. XII. 8-9, 11-12) A spot of blood on the hood of the coat was shown by DNA

analysis to be that of the victim Kevin Campbell, to a degree of accuracy of approximately one in thirty thousand persons. (T.E. XI. 236)

On the evening before, January 29, 1994, Courtney Mathews, another employee of Taco Bell, arrived home from work at approximately 7:30 p.m. and went immediately into his room. (T.E. XIII.249; XIX, 97) His roommate, Carl Ward, saw him break down his shotgun and place it, as well as a .9mm and a .25 caliber handgun, into a black book bag with shells. (T.E. XIII. 249) Mathews dressed in layered clothing, including a three-quarter-length black coat. (T.E. XIII. 251) Ward later identified the coat found by the Red River bridge as Mathews'. (T.E. XIII. 252) Mathews left his home approximately forty-five minutes later, with the book bag and a bowling bag, and told Ward and a group at his house that they would not see the clothes again. (T.E. XIII. 251, 260-61) While out driving to the store shortly thereafter, Ward saw Mathews driving down the road. (T.E. XIII. 254)

A week before the robbery and murders at Taco Bell, James Bowen saw Mathews talking to the petitioner, David Housler, at a party held at a trailer in Oak Grove, Kentucky. (T.E. XIV. 114; XIII. 231; XIV. 11, 62) They were discussing a robbery at Taco Bell. The two argued over who would actually "pull the gun," with the petitioner insisting that he should be the one to do it. (T.E. XIV. 114, 118, 125) Mathews proposed robbing Taco Bell because he worked there and knew when it closed and how many people would be there. (T.E. XIV. 117)

On February 2, 1994, T.B.I. Agent Anthony Clark searched Mathews' home and recovered several bullet fragments and unspent rounds. (T.E. XIII. 147-149) One of the live cartridges recovered from Mathews' home was

determined to have been extracted from the same gun that fired the .9mm cartridge cases at Taco Bell (T.E. XIII. 173), and a cartridge case recovered at Mathews' home was determined to have been fired from the same firearm as well. (T.E. XIII. 175) A jacket fragment from Mathews' home was fired from the same gun that fired the eight bullets at Taco Bell (T.E. XIII. 174), and a bullet and fragments recovered from the bodies of two of the victims were fired from the same gun as a bullet recovered from Mathews' home. (T.E. XIII. 179-181) In addition, the fingerprints lifted from the fan vent and door jamb at Taco Bell were identified as Mathews'. (T.E. XII. 34, 50-51) A bowling bag recovered from the back seat of Mathews' car was found to contain $2,576 in small bills. (T.E. XI. 221-22)

In March 1994, petitioner was interviewed by T.B.I. Agent Jeff Puckett. He told Puckett at that time that he was at the "party trailer" in Oak Grove on the night of the murders and denied ever meeting Courtney Mathews. (T.E. XVI. 70, 71) Petitioner spoke to Puckett again on March 21, 1994. At that time, he admitted having met Mathews at the trailer on January 21, 1994, and that Mathews said he had a place to rob. (T.E. XVI. 77) Petitioner heard Mathews say that he would not leave any witnesses — "we'll 187 them." (*Id.*) On October 10, 1995, petitioner spoke again with Puckett and with members of the district attorney's office. (T.E. XVI. 80-81) While reviewing his previous statement, petitioner said that he was the one who "gassed Mathews up" about the robbery and that he told Mathews that if he had "the balls" or would "grow the balls" to go, he, Housler, could be talked into going with him. (T.E. XVI. 82) On October 20, 1995, pursuant to a proffer agreement between petitioner and the district attorney's office, petitioner provided authorities with a detailed, signed statement in which he indicated that he

had been present at the Taco Bell, driving his own car, and sitting outside as a lookout. (T.E. XV. 244; XVI. 94-109)

Among the details petitioner included in this signed statement was that his girlfriend, Sulyn Ulganca, had been with him at the Taco Bell. After Ulganca denied this to authorities (T.E. XV. 248) and petitioner declined to confront her, his agreement was deemed breached, and he was subsequently indicted. (XV. 250)

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE TENNESSEE SUPREME COURT THAT THE ADMISSION AT TRIAL OF PETITIONER'S OWN STATEMENTS DID NOT VIOLATE HIS RIGHT TO DUE PROCESS DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Beyond cavil, and long established by prior decisions of this Court, is the principle that it violates due process for the prosecution knowingly to use false evidence in order to obtain a conviction. *See Mooney v. Holohan*, 294 U.S. 103 (1935). Petitioner asserts that the Tennessee Supreme Court has in this case "carv[ed] an exception to" and "qualified" *Mooney* and its progeny, but it has not. Instead the Tennessee Supreme Court simply found that these cases "are distinguishable from, and not applicable to, the present case." (Pet.App.A 18a) And rightly so — *Mooney* and its progeny do not apply here, and thus the state court decision does not conflict with those decisions, for two important reasons.

First, the false evidence at issue here consists of *petitioner's own statements* — not the testimony or other evidence provided by a *witness*. *Cf. Giglio v. United States*,

405 U.S. 150 (1972) (witness' perjured testimony); *Napue v. Illinois*, 360 U.S. 264 (1959) (same); *Alcorta v. Texas*, 355 U.S. 28 (1957) (same); *Pyle v. Kansas*, 317 U.S. 213 (1942) (same); *Mooney*, 294 U.S. 103 (same). The Tennessee Supreme Court cited decisions of this Court for the proposition that the confession of a criminal defendant, assuming that it is voluntarily made and sufficiently corroborated, is admissible in evidence. (Pet.App.A 19a) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963); *Smith v. United States*, 348 U.S. 147 (1954); *Opper v. United States*, 348 U.S. 84 (1954)) *See Lego v. Twomey*, 404 U.S. 477, 483 (1972). Petitioner thus asks this Court to entertain something of a paradox: that he lied to authorities regarding the details of his involvement as a lookout for the robbery; that those lies were ultimately used against him in court; and that this use of his own lies against him violated his right to due process.

This cannot be right. The statements made to investigators by a criminal defendant are often a staple of the prosecution's case, and, contrary to petitioner's assertions, experience shows that such statements are often full of lies — misstatements, exaggerations, minimizations, deceptions, embellishments, etc. A rule that would prohibit the use of such statements, or require prosecutors to sift through them and proffer only those parts they believed, would be completely unworkable. But in any event, *Mooney* and its progeny simply do not support the illogical proposition advanced by petitioner. As the Tennessee Supreme Court observed, "the concerns that animated [this] Court's decisions in *Mooney* and its progeny differ significantly from concerns that arise with the use of the defendant's own statements" (Pet.App.A 18a) — an observation that alludes to reason number two.

The essence of the due process violation contemplated by *Mooney* and *Napue* and like cases, and the unstated assumption of the principle that the prosecution may not knowingly use false evidence to obtain a conviction, is the prosecution's use of the falsehood to deliberately *deceive* the court and the jury and thereby *contrive* a conviction — in other words, the prosecution's presenting the jury with the falsehood *as if it were the truth*. *See Mooney*, 294 U.S. at 112 (due process denied "if a state has contrived a conviction . . . through a deliberate deception of court and jury"); *Napue*, 360 U.S. at 269 (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y.App. 1956)) (prosecutor who knows witness has lied has "duty to correct what he knows to be false and elicit the truth"). *See also Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 2409 (2005) (Souter, J., concurring) (noting that claim at issue was not "that the prosecution deliberately deceived or attempted to deceive [the] trial court, as in *Mooney*"). Here, the prosecution did no such thing. As the State pointed out to the Tennessee Supreme Court, petitioner cannot point to any instance in which the prosecution urged the jury to accept as true any part of his statement that it believed to be false. And the court so found: "[T]he prosecution did not attempt to corroborate known falsities that the confession contained, but rather only those portions that it believed were true." (Pet.App.A 24a) Indeed, the prosecution expressly stated to the jury that "[i]t never ever has been the contention of the State that every line, every sentence in [petitioner's] statement . . . is true." (T.E. XXI. 95)

And this second point leads in turn to yet another reason for this Court to deny review here. While the prosecution certainly *disbelieved* many of the details contained in petitioner's statement, it lacked the kind of *knowledge* of falsity necessary to give rise to a due process violation, even

if it *had* presented such details as true. Before the Tennessee Supreme Court, the State merely assumed *arguendo* that the prosecution "knew" that portions of petitioner's statement were false.[1] While the Tennessee Supreme Court nevertheless saw fit to "recognize that [petitioner's] confession contained many known factual falsehoods" (Pet.App.A 19a), the "knowledge" contemplated by the court was merely that gained from an evaluation of the overall state of the evidence in the case. *See* Pet.App.A 19a ("In this case, the *evidence* demonstrates the falsity . . . of many peripheral facts in Housler's statement.") (emphasis altered). Such "knowledge" is vastly different from that possessed by the prosecution in *Mooney*, *Alcorta*, *Napue*, and the like. *See, e.g.*, *Giglio*, 405 U.S. at 152 (witness testified that no promises were made by prosecution for his testimony, but a prosecutor had in fact made such a promise); *Napue*, 360 U.S. at 267 (same); *Alcorta*, 355 U.S. at 31 (witness testified to innocent relationship with defendant's wife after previously telling prosecutor he had been intimate with her). Indeed, in petitioner's effort to illustrate for this Court "the particular known false facts" in his own statement, he points to the evidence presented at the trial of his co-defendant, Mathews. (Pet. 21) Petitioner's claim, then, that the prosecution knowingly presented false evidence ultimately amounts to little more than a variation on his claim that the prosecution presented inconsistent theories and evidence at the two trials. *See* discussion in Section II, *infra*. And as the Tennessee Supreme Court observed with respect to that latter claim,

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[1] At the same time, however, the State pointed to a state investigator's testimony as providing a more apt characterization. *See* T.E. XVII. 162 (Agent Puckett testified that "[p]ortions [of petitioner's statement] are true and portions are not accurate and portions are uncorroborated. . . . There are portions in there that I think are untrue.").

while prosecutors are duty-bound not to present evidence that they know to be false, in the end, "prosecutors are not finders of fact." (Pet.App.A 27a).

The Tennessee Supreme Court determined that petitioner's statements were voluntary — a point he no longer disputes. (Pet.App.A 21a) And they were sufficiently corroborated so as to be admissible. (Pet.App.A 23a) Due process demands no more. The ultimate question regarding the truth or falsity of petitioner's statements was properly left to the determination of the jury. *See Lego*, 404 U.S. at 484-485. Because the state court decision on this issue does not conflict, but instead fully comports, with this Court's prior decisions, certiorari is unwarranted on this question.

II. THIS CASE PRESENTS NO IMPORTANT FEDERAL QUESTION FOR THIS COURT TO SETTLE REGARDING THE PRESENTATION OF INCONSISTENT THEORIES, BECAUSE THE PROSECUTION PRESENTED ENTIRELY CONSISTENT THEORIES AT THE RESPECTIVE TRIALS OF PETITIONER AND HIS CO-DEFENDANT, COURTNEY MATHEWS.

In *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398 (2005), the prosecution had presented inconsistent theories at the respective trials of two co-defendants charged with murder. In proceedings on Stumpf's guilty plea and sentencing, the prosecution asserted that, while he and a co-defendant, Wesley, were robbing a couple in their home, Stumpf shot and killed one of the victims. At the subsequent trial of Wesley, however, the prosecution asserted that Wesley was the shooter. Vacating a Sixth Circuit judgment that Stumpf's due process rights had been violated by the presentation of these inconsistent theories, this Court

concluded that there had been no due process violation. Because both men could be guilty of murder regardless of who actually killed the victim, the Court held that "the precise identity of the triggerman was immaterial to Stumpf's conviction." *Id.*, 125 S.Ct. at 2407.

Deciding this case with the benefit of *Stumpf*, the Tennessee Supreme Court did not need even to address the due process question; it concluded instead that "*the State did not pursue inconsistent prosecutions at Mathews' and the [petitioner's] respective trials.*" (Pet.App.A 25a) (emphasis added) "[I]n fact, the core theory of the two prosecutions was consistent — namely, that Mathews shot the victims and robbed the store, while [petitioner] served as a lookout. These two theories obviously are not irreconcilable." (Pet.App.A 27a)[2] To the extent that inconsistencies did exist, they "did not exist at the core of the prosecutors' cases." (Pet.App.A 26a-27a) They related instead to the peripheral details regarding Mathews' and petitioner's involvement in the robbery and murders (Pet.App.A 19a), and, thus, were immaterial. *See* Pet.App.A 27a ("How Mathews and Housler arrived at the Taco Bell on the night of the murders is immaterial to their guilt, ...") *See also Stumpf*, 125 S.Ct. at 2407.

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[2] Petitioner relies on the conclusions drawn in this respect by the trial judge, but these are superseded by the conclusions of the Tennessee Supreme Court. Indeed, the Tennessee Supreme Court expressly found that "[petitioner's] 'lone perpetrator' characterization of Mathews' prosecution is demonstrably false," (Pet.App.A 25a), thus impliedly rejecting the trial court's conclusion to the contrary. *Cf.* Pet. 27 (pointing to "the finding[] of the trial judge that the *Mathews'* prosecution [was] sole perpetrator/lone actor").

Furthermore, the source of most of these inconsistencies was petitioner's own statement, which "contained numerous falsehoods that contradict evidence presented at Mathews' trial" (Pet.App.A 26a), and which, again, the prosecution did not wholly embrace. *See* T.E. XXI. 103 (prosecution argued to jury that "[i]t doesn't make any difference . . . as far as the guilt or innocence is concerned" whether the defendant purchased ammunition, or stopped at a mini-mart on the way to Taco Bell, or rode with Mathews to the Taco Bell).[3] As the Tennessee Supreme Court noted, petitioner certainly pursued this matter at trial, "present[ing] evidence to the jury indicating various inconsistencies in the factual accounts." (Pet.App.A 28a) *See Stumpf,* 125 S.Ct. at 2410 (Thomas, J., concurring) (noting the guarantee of vigorous adversarial testing of guilt and innocence).

Petitioner gives only passing recognition to this Court's decision in *Stumpf,* focusing instead on the Sixth Circuit decision in that case. But while it may not be entirely inaccurate for petitioner to assert that "[t]his Court did not reverse the Sixth Circuit's finding that the use of inconsistent irreconcilable theories to convict two defendants for the same crime is a due process violation" (Pet. 26), it is nonetheless misleading. This Court *did* vacate the portion of the Sixth Circuit judgment holding that Stumpf's due process rights had been violated, thus rendering irrelevant petitioner's assertion that "the Sixth Circuit decision in *Stumpf* and the Supreme Court of Tennessee's decision in this case cannot be

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[3] What *did* make a difference, the prosecution argued further, was whether "[petitioner was] down at Taco Bell in the early morning hours of January 30th . . . and if he was down there, was he down there as a participant in a robbery in which four innocent people were murdered?" (*Id.*)

reconciled." (Pet. 27) There is no conflict with *this* Court's decision in *Stumpf*, and because the state court decided that the prosecution did *not* present inconsistent theories in this case, there is no due process question for the Court to settle. Accordingly, certiorari is unwarranted on this question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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